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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1933

## No. 575

JOHN L. GILVARY, PETITIONER,

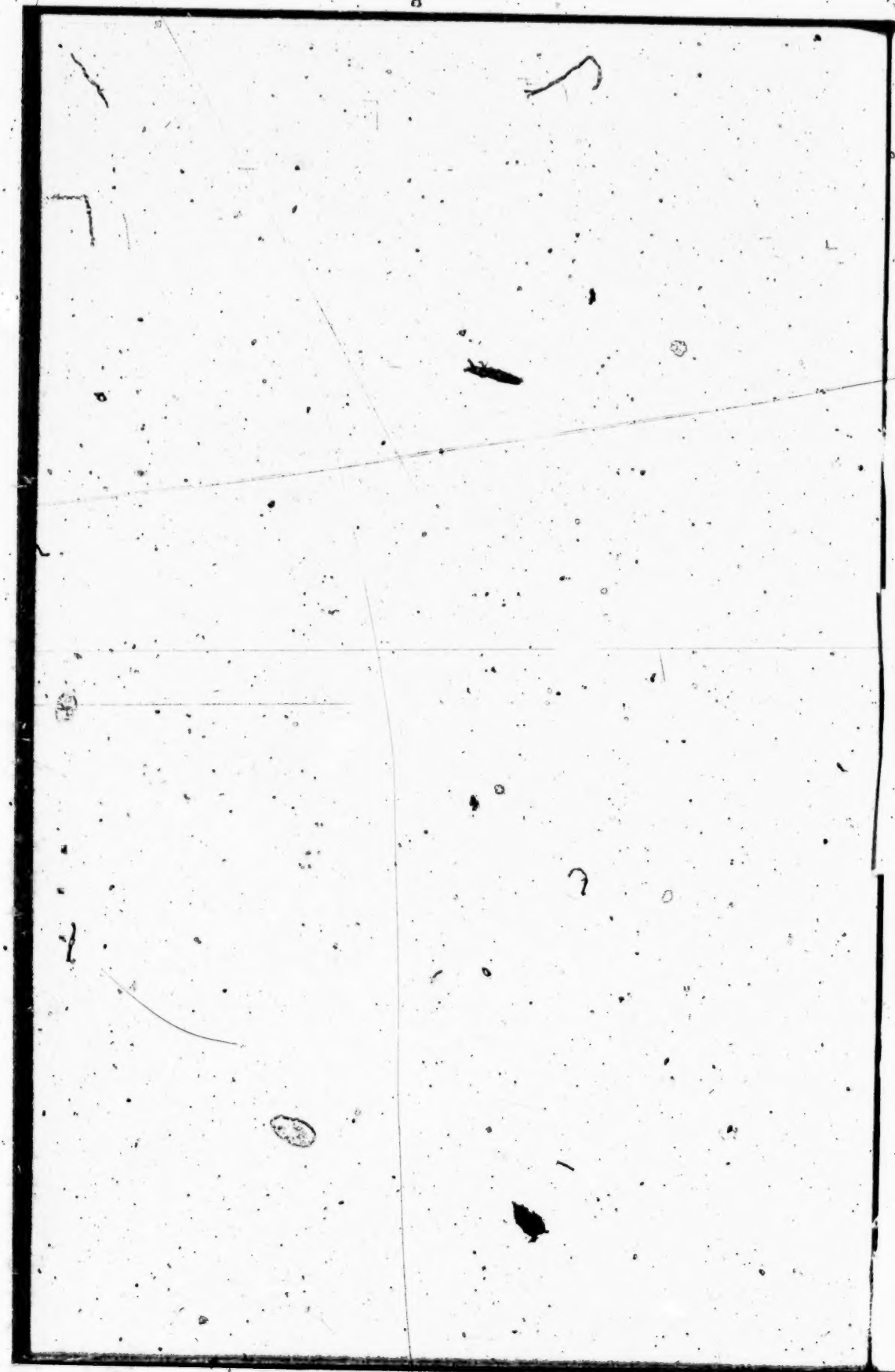
*vs.*

CUYAHOGA VALLEY RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED NOVEMBER 8, 1933

CERTIORARI GRANTED DECEMBER 11, 1933



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## IN SUPREME COURT OF OHIO

No. 23,947

JOHN GILVARY, Plaintiff in Error,

vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY, a Corporation, Defendant in Error

Error to the Court of Appeals of Cuyahoga County

PETITION IN ERROR—Filed in the Supreme Court

Plaintiff in error files this petition in error as of right upon the grounds hereinafter appearing, and says that at the September, 1932, term of the Court of Appeals of Cuyahoga County, Ohio, the defendant in error, in a case wherein the latter was plaintiff in error and the plaintiff in error was defendant in error, recovered a judgment by the consideration of said court against plaintiff in error, reversing a judgment theretofore had and obtained by plaintiff in error against said defendant in error in the Court of Common Pleas of said County, and entering final judgment against this plaintiff in error and in favor of defendant in error. A transcript of the record and of the docket and journal entries in said cause is filed herewith, together with a bill of exceptions setting forth all of the evidence in the [fol. 2] cause. There is error in said record in the following respects:

1. The case involved a construction of Article 2, Sections 34 and 35 of the Constitution of the State of Ohio, and of the provisions of General Code Section 1465-98 in the light of said constitutional provisions which were asserted as the basis of the defense interposed by the railroad to the petition of plaintiff, which was grounded upon the Federal Safety Appliance Act. In so construing and interpreting said constitutional provisions and statute as to reach a conclusion that such provision and statute warrant the denial of the Federal right asserted, the Court of Appeals gave an effect to Article 2, Sections 34 and 35 Ohio Constitution,

which brings said sections into conflict with Article 1, Section 8 of the Constitution of the United States, and in conflict with the Federal Safety Appliance Law, enacted pursuant thereto.

2. In rendering final judgment against plaintiff in error and in favor of defendant in error the Court of Appeals violated the provisions of Article 1, Section 5, Ohio Constitution, under which plaintiff in error is entitled to trial by jury of said cause of action based upon said Federal Act.

3. In holding that under Article 2, Sections 34 and 35, and General Code Section 1465-98, the plaintiff in error was barred from the assertion of his cause of action under the Federal Safety Appliance Law by reason of having previously filed a so-called "election" to submit a portion of his rights of a non-federal nature to the jurisdiction of the Industrial Commission of Ohio.

[fol. 3] Wherefore, plaintiff in error prays that said judgment of the Court of Appeals be reversed and that the judgment of the Court of Common Pleas in his favor be affirmed, and that he be restored to all things that he has lost thereby.

Bernsteen & Bernsteen, Attorneys for Plaintiff in Error. M. L. Bernsteen, J. E. Mathews, of Counsel.

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IN SUPREME COURT OF OHIO

PRÆCIPE FOR SUMMONS

To the Clerk:

Please issue summons in error in the above entitled cause for the defendant in error, The Cuyahoga Valley Railway Company, and make service thereof on said defendant in error or upon its attorneys of record, Tolles, Hogsett and Ginn, and W. T. Kinder, Union Trust Building, Cleveland, Ohio. Make same returnable according to law, endorsing: "Petition in Error in Supreme Court of Ohio to reverse judgment of Court of Appeals of Cuyahoga County, Ohio."

Bernsteen & Bernsteen, Attorneys for Plaintiff in Error.

[fol. 4] In Court of Appeals of Ohio, Cuyahoga County, January Term, 1932

No. 12,597—Common Pleas 327,740

The Cuyahoga Valley Railway Company, Plaintiff,

vs.

John L. Gilvary, Defendant

Docket and Journal Entries

March 18th, 1932.—Petition in error, waiver of process, transcript and original papers from Common Pleas filed.

June 15th, 1932.—Brief of Plaintiff in Error, and two copies filed.

July 2nd, 1932.—Undertaking by Plaintiff to stay execution in $35,000.00 filed.

September 14, 1932.—Brief of Defendant and two copies and proof filed.

November 25th, 1932.—Motion to continue filed.

November 30th, 1932.—Brief of Plaintiff and two copies filed.

December 5th, 1932.—To Court: The motion to continue is overruled. Exceptions. Journal 9, page 440.

December 28th, 1932.—To Court: This cause came on to be heard upon the pleadings, and the transcript of the [fol. 5] record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed, for the reason that the acceptance and notice of election by the employer and employee contract approved by the Industrial Commission of Ohio is a complete bar to a right of recovery in this action and is therefore contrary to law, and final judgment is hereby rendered for Plaintiff in Error; no other error appearing on the record, and this cause is remanded to said Court of Common Pleas to carry this judgment into execution. The defendant in error excepts. Levine, Judge, dissents. Journal 9, page 466.

(Duly certified.)

IN COURT OF APPEALS OF OHIO

PETITION IN ERROR—Filed March 18, 1932

Plaintiff in Error, The Cuyahoga Valley Railway Company, says that at the January Term, 1932, of the Court of Common Pleas of Cuyahoga County, Ohio, defendant in error, John L. Giffary, recovered a judgment against the plaintiff in error in an action therein pending wherein defendant in error was plaintiff and plaintiff in error was defendant. The original papers, transcript of docket and journal entry whereof are filed herewith.

Plaintiff in error says there is error in said record and proceedings in this, to-wit:

[fol. 6] 1. The verdict of the jury is aganist the evidence in the case and is not supported by the evidence.

2. The verdict of the jury is against the weight of the evidence.

3. The verdict of the jury is contrary to law.

4. The amount awarded by the jury is excessive and appears to have been given under the influence of passion and prejudice.

5. The Court erred in overruling the motion of plaintiff in error to withdraw the case from the consideration of the jury and for judgment in plaintiff in error's favor made upon defendant in error's opening statement and the stipulation entered into by the parties immediately after the opening statement, and which was considered by the Court as part of the opening statement.

6. The Court erred in overruling the motion of plaintiff in error to direct a verdict in its favor made at the close of all the evidence offered by the defendant in error.

7. The Court erred in overruling the motion of plaintiff in error to direct a verdict in its favor made at the close of all the evidence.

8. The Court erred in the exclusion of evidence offered by the plaintiff in error, to which ruling the plaintiff in error excepted at the time.

9. The Court erred in admitting evidence offered by the defendant in error over the objection of the plaintiff in

error, to which ruling the plaintiff in error excepted at the time.

10. The Court erred in refusing to give to the jury before argument Instruction No. VII requested by the plain-
[fol. 7] tiff in error, to which refusal of the Court plaintiff in error excepted at the time.

11. The Court erred in withdrawing the plaintiff in error's second defense from the consideration of the jury, to which plaintiff in error excepted at the time.

12. The Court erred in withdrawing the plaintiff in error's third defense from the consideration of the jury, to which plaintiff in error excepted at the time.

13. The Court erred in its charge to the jury, to which plaintiff in error excepted at the time.

14. Improper conduct of defendant in error's attorney in citing a case and reading from a law book to the jury, to which plaintiff in error objected at the time.

15. The Court erred in permitting counsel for defendant in error to read from a law book rules of law which were incorrect and not applicable to the facts of this case, to all of which plaintiff in error excepted at the time.

16. The Court erred in refusing to incorporate as a part of its general charge plaintiff in error's written request for a charge to be incorporated in the Court's general charge, to which plaintiff in error excepted at the time.

17. For other irregularities occurring and errors committed at the trial, which prevented plaintiff in error from having a fair trial and to which plaintiff in error excepted at the time.

Wherefore, plaintiff in error prays that the judgment of the Court of Common Pleas be reversed, that final judg-
ment be entered in its favor herein and that it be other-
[fol. 8] wise restored to the things it has lost by reason thereof.

The Cuyahoga Valley Railway Company, Plaintiff in Error, by Tolles, Hogsett & Ginn, Its Attorneys.

The issuance and service of summons in error is hereby waived and the appearance of John L. Gilvary, defendant in error, entered.

Bernsteen & Bernsteen, Attorneys for John L. Gilvary.

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In Court of Appeals of Ohio

Motion to Continue—Filed Nov. 25, 1932

Now comes Plaintiff in Error and moves the Court for an order continuing the hearing of this case from December 1, 1932 to the January Term for the reasons and upon the grounds as hereinafter set forth.

Tolles, Hogsett & Ginn, Attorneys for Plaintiff in Error.

Memorandum

The instant case is one of importance to both plaintiff in error and defendant in error and involves matters of statutory construction both of the Ohio and Federal statutes and also involves constitutional questions.

This motion is not made for the purpose of delay but by reason of the complication arising from the election of Judge Weygandt to the office of Chief Justice of the Su- [fol. 9] preme Court of Ohio, which office we understand he will assume on January first. We also assume that in the event Judge Weygandt participated in consideration of this case in this Court he would probably not participate in a consideration of the case when it reaches the Supreme Court—a contingency which we do not desire.

The case is one which in the event it reaches the Supreme Court of Ohio and which in view of the constitutional questions involved should receive the consideration of the entire bench—a matter which is of importance in view of the constitutional requirement that a statute may not be declared invalid except upon the concurrence of six judges of the Supreme Court and in further view of the rule requiring the concurrence of four judges out of seven of the Supreme Court to reverse or modify the judgment of the court below. In the event, under the circumstances, the services of a judge of the Court of Appeals outside of this District may be secured, plaintiff in error

is ready to go ahead upon the day set, to-wit, December 1, 1932.

An oral hearing on this motion is not requested.

Respectfully submitted, Tolles, Hogsett & Ginn, Attorneys for Plaintiff in Error.

Receipt, by copy, of the within Motion and Memorandum is hereby acknowledged this 23rd day of November, 1932.

An oral hearing is requested to be heard Monday, Nov. 28, 1932, at 9:30 A. M.

Bernsteen & Bernsteen, Attorneys for Defendant in Error.

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[fol. 10] In Court of Common Pleas of Cuyahoga County, September Term, 1929

C. P. No. 327740. C. of A. 12597

John L. Gilvary, Plaintiff,

vs.

The Cuyahoga Valley Railway Company, a Corporation, Defendant

Money Only

Docket and Journal Entries

November 12, 1929.—Petition and precipe filed and summons issued.

November 21, 1929.—Summons returned endorsed: On the 20th day of November, 1929, I served this writ on the within named The Cuyahoga Valley Railway Company by delivering a true and certified copy thereof with all the endorsements thereon to A. F. Slack, Managing Agent. The president or other officer of said Company not found in my county. Sheriff's Fees $1.87.

March 13, 1930.—To Court: Leave is granted to defendant to plead by March 29, 1930. Journal 258, Page 1821.

March 29, 1930.—Consent hereby given defendant move or plead by April 12, 1930.

April 12, 1930.—Consent hereby given defendant move or plead by April 26, 1930.

[fol. 11] April 26, 1930.—Consent hereby given defendant move or plead by May 10, 1930.

May 10, 1930.—Answer filed.

May 22, 1930.—Motion of plaintiff to strike filed.

May 27, 1930.—Brief of defendant filed.

June 12, 1930.—To Court: The motion by the plaintiff to strike out of the defendant's answer is overruled, to which plaintiff excepts. Leave is granted plaintiff to plead by June 28, 1930. Journal 259, Page 1854.

July 10, 1930.—Reply filed.

May 28, 1931.—To Court: This case is continued for the term on application of defendant. Plaintiff excepts. Case to be set for head of list for the next term Journal 263, Page 1518.

September 18th, 1931.—To Court: The parties by their attorneys come and a jury is duly empaneled and sworn, who after due trial report that they are unable to agree upon a verdict and jury is discharged from further consideration of this case. Journal 265, Page 316.

November 13, 1931.—To Court: The parties by their attorneys come and a jury is duly empaneled and sworn, who after due trial do find for the plaintiff in the sum of $35,000.00. Journal 265, Page 1918.

November 14, 1931.—Motion of defendant for new trial filed.

November 23, 1931.—To Court: Oral arguments heard and defendant is given until December 15, 1931 to file briefs and plaintiff until December 25, 1931, to file reply. Journal 265, Page 2196.

December 15, 1931.—Brief of defendant filed.

December 24, 1931.—Brief of plaintiff filed.

February 1, 1932.—To Court: The motion for new trial is overruled, to which defendant excepts. It is therefore [fol. 12] considered that said plaintiff recover of said defendant his said damages in the sum of $35,000.00 and also his costs of this suit, for all of which judgment is rendered against defendant. Journal 266, Page 835.

March 9, 1932.—Bill of Exceptions by defendant filed and notice issued.

March 11, 1932.—Notice of the filing of the Bill of Exceptions. Returned endorsed. March 10, 1932, I served this writ on the within named Bernsteen & Bernsteen, Attorneys of Record for Plaintiff by delivering a true and

certified copy thereof with all the endorsements thereon. Sheriff's Fees $.91.

March 18, 1932.—Objections of plaintiff to Bill of Exceptions filed.

March 18, 1932.—Petition in error filed in Court of Appeals by defendant.

March 21, 1932—Brief of defendant filed.

March 22, 1932.—Bill of Exceptions transmitted to trial Judge together with objections and brief of defendant.

March 26, 1932.—Bill of Exceptions received from trial Judge.

(Duly Certified.)

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IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

PETITION FOR MONEY ONLY—Filed Nov. 12, 1929

Now comes John L. Gilvary, plaintiff, and says that The Cuyahoga Valley Railway Company, defendant, is and was at all times herein mentioned, a corporation, duly organized and existing under and pursuant to the laws of the State of Ohio, empowered to operate and operating as a [fol. 13] common carrier, a steam railroad system, with its yards, tracks and trackage located in the County of Cuyahoga, State of Ohio, and particularly in and about the yards of The Otis Steel Company located in the City of Cleveland, said County and State.

Plaintiff says that at all times herein mentioned and for some time prior thereto, said defendant railroad company was engaged as a common carrier in both intrastate and interstate commerce.

Plaintiff says that in the slab yard of said Otis Steel Company, the defendant owns and maintains two sets of tracks, the direction of which is north and south, one track being known as the "east" track and the other track being known as the "west" track; that on or about the 17th day of April, 1929, and for some time prior thereto, plaintiff was employed by defendant as a switchman, and on said day was at work upon a certain train of said defendant company that was being switched and handled by said defendant company in said slab yard; that at or about 5:30 o'clock P. M., this plaintiff was engaged in coupling or attempting to couple the southerly end of said train to a cut

of two cars stationed upon said track; that while this plaintiff was between the said southerly car of said train and the northerly car of said two cars, said train started into movement in a southerly direction, and plaintiff's left arm was crushed between the couplers of said cars and injured as hereinafter set forth.

Plaintiff says that the direction of said east track is north and south; that said train consisted of an engine and about eight cars—the engine being at the northerly end of said train, facing north; that the said cut of cars was stationed just south of the southerly end of said train; that this de- [fol. 14] fendant, at different times attempted to couple said train to said cut of two cars by moving said train in a southerly direction toward said cut, for the purpose of coupling the southerly car of said train to the northerly car of said cut, but by reason of the defective and insufficient condition of the couplers upon said cars, said cars failed to couple, necessitating this plaintiff—for the purpose of coupling said cars—to go between the ends of said cars, to-wit: the end of the car at the southerly end of said train and the end of the northerly car of the said cut.

Plaintiff says that at all times herein mentioned and at the time this cause of action arose, there was in full force and effect, an Act passed by the Congress of the United States known as "The Federal Safety Appliance Act," as amended, of 1893, which at all times herein mentioned, read as follows:

"Amendment of 1903 to Federal Safety Appliance Act of 1893.

"An Act to amend an act entitled, 'An Act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety three, and amended April first, eighteen hundred and ninety six.

"Section 1. The provisions and requirements of the act entitled 'An act to promote the safety of employes, and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatice couplers and continuous brakes and their loco-

[fol. 15] motives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety three, and amended April first, eighteen hundred and ninety six (See PP 2401-2402) shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety three, as amended by the act of April first, eighteen hundred and ninety six, or which are used upon street railways."

Plaintiff says defendant was negligent in hauling or using said car on said line when the said car was not equipped with couplers coupling automatically by impact and necessitating this plaintiff to go between the ends of said cars, contrary to law; defendant was negligent in starting said train into movement while plaintiff was between the ends of said cars; defendant was negligent in failing to warn or apprise said plaintiff of its purpose of then and there starting said train into movement; defendant was negligent in failing to keep said train at a standstill until this plaintiff had given a signal for the movement of same; defendant was negligent in starting said train into movement and moving same without any signal [fol. 16] being given for said movement by this plaintiff.

Plaintiff says that wholly without any fault or negligence upon his part and solely by reason of the negligence of the defendant as herein set forth, and as the proximate cause thereof, he sustained crushing fractures to the radius and ulna of the left arm, a destruction of the ligaments, tendons and tissues of said arm, a fracture of the distal end of the phalanx of the thumb, by reason of which plaintiff says his whole left arm and hand have become permanently crippled.

Plaintiff says the fractures were such and the injuries were such that the space between the ulna and the radius is occluded; that the fragments of the radius and ulna are in poor apposition, accompanied with a dorsal bending of said bones.

Plaintiff further says that up to the present time there is no union in said bones; that by reason of said injuries the use, movement and strength of his left arm and hand have become completely destroyed.

Plaintiff says by reason of said injuries he was confined to the hospital for a period of five weeks (5) and has been and is still under a doctor's care; that he suffered the most excruciating pain in his whole left arm and hand and suffers pain at the present time.

Plaintiff says that he has been unable to perform any work since he has been injured and his ability to perform manual work, particularly that of a railroad employee, has become permanently lost; that at the time of said injuries he was forty four years of age, enjoyed good and robust health and earned and was capable of earning the sum of $200.00 per month as a railroad switchman.

[fol. 17] Wherefore, plaintiff says that he has been damaged in the sum of Fifty Thousand Dollars ($50,000.00) for which amount he asks judgment against the defendant.

Bernsteen & Bernsteen, Attorneys for Plaintiff.

(Duly verified.)

In Court of Common Pleas of Cuyahoga County

Answer—Filed May 10, 1930

First Defense: Now comes the defendant, The Cuyahoga Valley Railway Company, and admitting its corporate organization as in the petition alleged and that it operates a system of steam railroad located entirely within Cuyahoga County, Ohio, and admitting that on or about the 17th day of April, 1929, plaintiff was in its employ as a switchman and on said date while so engaged received certain injuries, the exact extent of which is to the defendant unknown, for its further answer denies each and every allegation in said petition contained other than herein expressly admitted to be true.

Second Defense: Referring to the admissions and denials of its first defense and making the same a part hereof as fully as if herein rewritten, defendant says that the plaintiff was a regular and experienced employe, fully familiar with the work in which he was engaged, including the conditions obtaining with respect thereto, and that plaintiff assumed the risk of the accident of which he complains.

[fol. 18] Third Defense: Referring to the admissions and denials of its first and second defenses and making the same a part hereof as fully as if herein rewritten, defendant further denying that at the time referred to in the petition either plaintiff or itself was engaged in interstate commerce, for its further answer herein avers at the times referred to in the petition, prior thereto and ever since, this defendant has in all respects complied with the so-called Workmen's Compensation Law of the State of Ohio, having paid in the necessary premiums required by the operation of said law and performed every other act to be performed necessary to compliance therewith and to secure the benefits and protection thereof.

This defendant further alleges that, pursuant to the provisions of said law, both it and the plaintiff, with the approval of the Industrial Commission, so-called, voluntarily accepted the provisions of said Workmen's Compensation Law by filing with said Commission written acceptances thereof, thereby subjecting plaintiff and this defendant to the provisions of said law.

Defendant further says that the Constitution of Ohio, as amended and effective on January 1, 1924, provides that compensation provided for by said Workmen's Compensation Law "shall be in lieu of all other rights to compensation or damages for * * * injuries * * * and any employer who pays the premium or compensation provided in the law * * * shall not be liable to respond in damages at common law or by statute for such * * * injuries * * *."

Defendant further averring that at the time referred to in the petition and prior thereto it had paid the premium [fol. 19] or compensation provided by law, therefore, the plaintiff may not maintain this action herein.

Wherefore, having fully answered, defendant asks to go hence with its costs.

Tolles, Hogsett & Ginn, Attorneys for Defendant.

(Duly verified.)

---

In Court of Common Pleas of Cuyahoga County

Reply—Filed July 10, 1930

The plaintiff, for reply to the second defense, denies that he was familiar with or had notice or knowledge of the conditions of his employment occasioning his injury, as set forth in the petition, and denies that he assumed the risk thereof.

The plaintiff, for reply to the third defense, for want of knowledge denies that the defendant complied with the Workmen's Compensation Law of Ohio, and further denies that plaintiff, at any time, accepted the provisions of that law or subjected himself to the operation thereof.

Further replying plaintiff avers that his action is founded upon the Safety Appliance Acts of the United States and upon the Employers' Liability Act of the United States and that, as against such Federal legislation, the said Workmen's Compensation Law of Ohio is inoperative and the allegations of the second defense and of the third defense of the answer do not constitute a defense to the petition.

Bernsteen & Bernsteen, Attorneys for Plaintiff.

(Duly verified.)

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[fol. 20] In Court of Common Pleas of Cuyahoga County

Motion for New Trial—Filed Nov. 14, 1931

Now comes The Cuyahoga Valley Railway Company, defendant herein, and, after a verdict and within three days from the rendition of same, moves for a new trial in the above entitled cause for each and all of the following reasons:

1. The verdict of the jury is against the evidence in the case and is not supported by the evidence.

2. The verdict of the jury is against the weight of the evidence.

3. The verdict of the jury is contrary to law.

4. The amount awarded by the jury is excessive and appears to have been given under the influence of passion and prejudice.

5. The Court erred in overruling the motion of defendant to withdraw the case from the consideration of the jury and for judgment in defendant's favor made upon plaintiff's opening statement and the stipulation entered into by the parties immediately after the opening statement, and which was considered by the Court as part of the opening statement.

6. The Court erred in overruling the motion of defendant to direct a verdict in its favor made at the close of all the evidence offered by the plaintiff.

7. The Court erred in overruling the motion of defendant to direct a verdict in its favor made at the close of all the evidence.

8. The Court erred in the exclusion of evidence offered by the defendant, to which ruling the defendant excepted at the time.

[fol. 21] 9. The Court erred in admitting evidence offered by the plaintiff over the objection of the defendant, to which ruling the defendant excepted at the time.

10. The Court erred in refusing to give to the jury before argument Instruction No. VII requested by the defendant, to which refusal of the Court defendant excepted at the time.

11. The Court erred in withdrawing the defendant's second defense from the consideration of the jury, to which the defendant excepted at the time.

12. The Court erred in withdrawing the defendant's third defense from the consideration of the jury, to which defendant excepted at the time.

13. The Court erred in its charge to the jury, to which defendant excepted at the time.

14. Improper conduct of plaintiff's attorney in citing a case and reading from a law book to the jury, to which defendant objected at the time.

15. The Court erred in refusing to incorporate as a part of its general charge defendant's written request for a charge to be incorporated in the Court's general charge, to which defendant excepted at the time.

16. For other irregularities occurring and errors committed at the trial, which prevented defendant from having a fair trial and to which defendant excepted at the time.

Tolles, Hogsett & Ginn, Attorneys for Defendant.

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[fol. 22] In Court of Common Pleas of Cuyahoga County

**Defendant's Bill of Exceptions**—Filed March 9, 1932

Be it Remembered, That heretofore, to-wit, on Monday, the 9th day of November, A. D. 1931, the same being one of the days of the regular September, 1931, Term of said Court, the above-entitled cause coming on for trial before the Honorable C. S. Turnbaugh, a Judge of the Court of Common Pleas, sitting in Cuyahoga County by designation of the Chief Justice of the Supreme Court of Ohio, came the parties, in person and by their Counsel, and both sides announcing ready, came a good and lawful jury, which was duly examined, empaneled, and sworn to try the issues joined; whereupon the following proceedings were had.

Appearances: M. L. Bernsteen, Esq., and Harry Clark, Esq., of Messrs. Bernsteen & Bernsteen, Counsel for Plaintiff. W. T. Kinder, Esq., and Thos. O. Nevison, Esq., of Messrs. Tolles, Hogsett & Ginn, Counsel for Defendant.

Thereupon counsel for the plaintiff made the opening statement to the jury as follows:

Plaintiff's Opening Statement

Mr. Bernsteen: If the Court please, Ladies and Gentlemen of the Jury: The plaintiff, John L. Gilvary, on April 17th, 1929, about two and a half years ago, was em-

ployed by the Cuyahoga Valley Railroad Company as a yard brakeman or switchman. This railroad company operates its railroad down here in the Cuyahoga Valley, and does most of its work for the Otis Steel Company, and for [fol. 23] other companies along its line. It was engaged in what is known as both state and interstate commerce; that is to say, they would handle cars and haul cars that were—the commerce would arise in the state and end in the state, and also handle cars that would be brought in from other states and sent out to other states, called interstate commerce—engaged in both kinds of work.

Now, it seems that he had been working for the company, I think, nine or ten months, as a switchman, and he was an experienced railroad man, having worked for the Pennsylvania Railroad for about—at one time, for about thirteen years. On that day he was working, at that time he was forty-four years of age. He is now forty-six years of age. On the day in question he was working in what is known as the Clark Avenue Yards of the Cuyahoga Valley Railroad Company, and particularly what is known as the Slab Yards, down near the Clark Avenue bridge in the City of Cleveland, in the southwestern side of the City of Cleveland.

He was the rear brakeman. The crew consisted of an engineer and a fireman, a conductor, a head man, and a rear man; and he was the rear man. In that yards there is two tracks, which you will be interested in, and particularly one track known as the west slab-yard track, and the east slab-yard track. These tracks run north-and-south, these two tracks, and the west track is toward the west and the east track is toward the east, and the east slab track runs off, it is the northerly end, off the west slab track, and so that—and these tracks run north-and-south, as I said before, and therefore all the work or switching that goes into the west slab—into the east slab track, where it comes off the west, [fol. 24] must be at the northerly end of the east slab track. This track has a slight grade to it, this east slab track, a grade toward the south—an up-grade toward the south, and a downgrade toward the north. There is also a slight curve in that east slab track, for it was upon the east slab track that he was hurt.

Now, it seems he had done some switching, the company had, and its crew had, around five o'clock in the evening or five-thirty, upon the west slab track, and then they intended to go over on the east slab track and couple on a cut of cars to a standing gondola car; that is to say, there was a standing gondola car at the steel—standing hopper car they call it, a steel hopper car standing on the east slab track, about half way on the track, and then there was the purpose of the crew to back in from the northerly end onto this east track and couple on a cut of cars to the standing cars.

Now, this cut of cars consisted of about six or seven cars, and the engine was at the northerly end facing the north, and this cut of cars was attached to the rear end, so you first have the engine and a tank, and then six or seven cars. The engine was at the northerly end, and the most southerly car of this cut of cars was a B. & O. gondola car filled with lumber, and it was the purpose, to repeat, to couple on, so that this B. & O. lumber car, moving back southerly, would couple on to the standing hopper car. Now, each car has at each end a coupler, and this coupler is attached, to what they call the head of it, to a draw-bar, or draw-head that goes underneath the car and comes out at the end of the car; and at the end of the car is the coupler, and the very end of it is called a knuckle, something like a man's [fol. 25] hand to a certain extent, a knuckle, and in that knuckle there is a pin, and so if they want to couple cars on, one coupler being open, sufficient, or both can be open—usually one—they come together and they grab like that (indicating), and they couple together.

Now, it was the law at that time, passed by Congress, known as the Federal Safety Appliance Act, a law that applied to this railroad and to an employee like Mr. Gilvary, on that day. This law required that the railroad companies, like this railroad company, in their work, had to have on every car couplers at both ends that would couple automotically by impact, without the necessity of men going between the cars. That is to say, the law required that when the couplers had to couple themselves automatically by impact, by bumping, so men would not be compelled by any necessity to go between the cars to help in the coupling. That was the law, and that was the law that applied in the case at the time he was hurt.

Now, when the engine backed these eight or six or seven cars, and moved toward the north, to go back onto the east track, Mr. Gilvary walked over to the standing hopper car, to the easterly side, which was the proper side, and the right side, because that was the engineer's side, at the standing coupler, to stand there while the coupling was being made, when the cars were backed down by the engine; so the engine backs down these six or seven cars, toward the standing car, and as they back down, Mr. Gilvary puts out what they call a "steady" signal to the engineer, who was six or seven car-lengths away, about two hundred fifty or three hundred foot away from them. When the cars come together, he swings them down, because the cars failed to couple.

[Tol. 26] It seems that the coupler on the standing car was open and the other one was closed, which was proper in the coupling work, but they failed to couple because the knuckle on the standing car closed and they failed to couple. When they failed to couple, Mr. Gilvary got hold of the lifting-lever on the side of the standing car, to open this knuckle again. Now, they have a lifting-lever on these cars, which extends down from the coupler out to the side of the car, so a man can get hold of it, without necessitating him going between the cars; so he got hold of the lifting-lever and pulled up three or four times, and he finally got the knuckle open. And then they are ready for coupling. He signaled the engineer to come ahead. The engineer comes back, and again the knuckle closes and again they fail to couple; so Mr. Gilvary again gets hold of the lifting-lever of the standing car, to open it, and he couldn't open it, so he sees, then, there is necessity for him to go between the cars; so he gives the engineer what they call a "hold" signal, or a "stop" signal. He goes in between the cars and he tries to open the knuckle on the standing hopper car, and he can't get it open. Then he steps over to the other car to open up that knuckle with his hand, because the lifting-lever is over on the other side; but before he can do that, though, he finds that the other coupler, on the B. & O. lumber car, the B. & O. car, was out of line, too far over, away from him, so he goes in and he puts his left arm around this bulky coupler, to pull it into line so they will couple, and he gets it to moving, it is almost over. Suddenly, the train comes back and his arm is caught between the couplers.

[fol. 27]. When they failed to couple automatically, as I explained to you, by impact, and compelled this man to go between the cars to assist in this coupling, this necessity was a violation of the Federal Safety Appliance Act.

When he had his hand caught in the couplers, there, he put his other hand out, and he tried to wave to his engineer so he would get the signal he was caught or something, and all of a sudden, the train moved back toward the north, which was down-grade, there, and his hand fell out. He grabbed it, like this (indicating), and he felt the blood running down his arm, so he went down like that (indicating), and hollered for help. The conductor came running up to him. The conductor was very much excited, didn't know what to do for a moment or two, and then a colored man came up. They tore off the bottom of his overalls and he tied the arm up to stop the bleeding, and then the head man ran down and took out his handkerchief and tied up Mr. Gilvary's hand. He was rushed over to the emergency hospital, and then he was taken over to St. Luke's hospital, where he stayed for five weeks. The company then made a kind of a shield for his arm, made of leather and steel, which he wore day and night for many months, and he wears still at night time, because his arm was terribly crushed, and you will see the X-ray pictures some time today, and it shows the bones have been broken and twisted and put out of place, and also the thumb, but particularly other bones below the wrist, so the arm is all deformed. The flesh is all torn and lacerated, and all the blood-supply channels and the nerves were all torn, so that today he has what is known as a "claw" hand; that is to say, the hand [fol. 28] is cold and clammy, the fingers are stiff, and he puts them in water and soaks them and manipulates them all the time, not to get them any better, because he can't get them any better, or prevent them getting worse clawed than they are, and the wrist is stiff and the arm turned and the whole hand and arm are useless to him.

At the time he was injured he was forty-four years of age, earning two hundred dollars a month, and he has not been able to work since he was hurt, and for his pain and suffering he suffered and will suffer in the future, and for his loss of wages, already lost, and that may be lost in the future, and particularly for the deformed and useless hand and arm, we are asking a judgment at your hands against this company, the Cuyahoga Valley Railroad.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

Mr. Kinder: If your Honor please, members of the jury: I trust, notwithstanding the vigorous statement on behalf of the plaintiff, you have withheld your judgment about the merits of this controversy, and will withhold it, until you hear the charge of the Court, and the witnesses.

Now, Mr. Gilvary was a brakeman, worked for the Cuyahoga Valley Railroad. On the occasion of his accident, his crew—that is to say, the engineer and fireman, who were in charge of the engine, Mr. Gilvary, the conductor and the head brakeman comprised that crew—they were not engaged in what Mr. Bernsteen says was interstate commerce, on that occasion. What they were doing was——

[fol. 29] Mr. Bernsteen: Just a moment, Mr. Kinder. I didn't say they were engaged in interstate commerce at that time.

Mr. Kinder: Well, I—no, no. You said that the railroad was engaged in both interstate and intrastate commerce.

Mr. Bernsteen: That particular movement was state—not interstate.

Mr. Kinder: Well, that was a matter which you did not cover.

Mr. Bernsteen: Oh, I see.

Mr. Kinder: And what I wanted to——

Mr. Bernsteen: Oh, I see.

Mr. Kinder: So it is conceded here that, at the time these men were pushing these cars around, they were engaged in what is known as intrastate commerce, which is a legal term, but it means just what it says—that is to say, for the purpose of this case, it might be just the same as if Mr. Gilvary was driving a truck of wooden blocks from one part of the plant to another. That is to say, in these cars which they had hold of; some of them were empty, and others had lumber which was in the course of being transferred from one place in the plant to another. Now, in order to make this a little easier to understand, in advance of the evidence, we have a map here, with various lines on it, which are tracks. Some of the tracks belong to the Otis Steel Company, and some of them to the Cuyahoga Valley, but this is all inside the Otis Steel Company property.

Now, you will observe that right here is a track that comes off—there was a double line for the track—and goes

along in a southerly direction. This map to the right is [fol. 30] north. Some of you are familiar with where the Clark Avenue bridge crosses the valley, there? Well, this is located just south of the Clark Avenue bridge. Now, they had come around with their engine. They had an engine there, and they had five or six cars attached to the engine. The engine was headed to the north, and they had backed in and left a car down here on this track which is known as the west track, and which they had kind of kicked in, as they do, by kicking it in and pulling the lever, and they let that car in on this track, and Mr. Gilvary had charge of that movement; and when the cars stopped, he was charged with the duty of seeing that the car stayed there; and he waited until after it stopped, and it stopped in the proper position, and then, because the next movement was going to be in on this east track, which runs off of the west track, Mr. Gilvary came across in here to this place (indicating), where there is a curve. See, this track comes in there, and then curves along, and it is right in front of what they call the "blooming mill." There is a platform there, from which they take lumber and steel and one thing and another out of the cars. Now, you will observe that after kicking this car down here, then the engine had hold of six cars, and they had to pull back up far enough so that the conductor, who will testify, would throw this switch, and then the move was to back in on that track, down to where this car was standing, where Gilvary was, and make a coupling there, let the two cars come together so they would be coupled, because they were going to then pull out here, put some loaded cars down in there, out of their train, and then shove some empty cars in, and then go in on this track and push the loaded cars back in again. It was a kind of a re-arrangement of cars, but they never got to that.

[fol. 31] Mr. Gilvary signaled the movement, and they came on back, and there was a freight car standing right on this curve. It was what they call a "Pee Mickey" Pittsburgh, Monongahela or something, I have forgotten—a "Pee-Mickey" car, which was a gondola—we will have pictures of it, here—or a hopper car, was standing there. The train came back very slowly. They didn't have to move very far. It is three or four car-lengths down there, and these freight cars are equipped with couplers. I will

have a model coupler down here, so as to show you how they work, but generally speaking, if you take your hand and have this for one of the knuckles—of course, it is a big, iron thing, on a draw-bar, and these knuckles move, and they have a pin that goes down—generally speaking, if this coupler is open—I can use my hands—and this one closed, the couplers are so fixed that they will go in like that (indicating) and couple; and then, after they couple, there is a pin drops down to hold the great big knuckle in there. Now, these couplers, which I will use my hand for one, are on what is known as draw-bars, which my elbow will serve as an example. And those draw-bars are fastened to the under part of the freight car. Those draw-bars necessarily have some side-play in them. That is, the coupler is on the end of the draw-bar. They necessarily have some side-play in them, because you will observe it is necessary in the operation of railroad cars that they go around curves, so that, as the coupler goes around, as the cars go around a curve, this draw-bar has to have some play. It couldn't be fixed, right like that (indicating). Otherwise they would never get around the curve. The permissible play, under the law, is, I think, three inches—the play in the draw-bar.

[fol. 32] Now, the cars came back onto this curve. This one car was, of course, facing north. The other car was facing south, and an attempt was made to couple, and the couplers did not "make." Now, the evidence will disclose that the reason the couplers didn't make was not due to any defect in the couplers, because the evidence will show the couplers to have been in a one hundred per cent condition; but it was due to the fact that this draw-bar, as this car stood on that curve, and this car comes down here, this draw-bar was not properly adjusted, which it is Mr. Gilvary's business to take care of before an attempt is made to couple, because, obviously, you can't have one draw-bar adjusted within the permissible limit, one way, and the other the other, and have these couplers make on a curve, which was what they call a three-degree curve. The engineer will testify as to the degree of the curve and as to the condition of the track.

Now, it is not a fact that there were two other attempts to couple those cars. What happened was, due as I have said to the play of the draw-bars and their being out of

adjustment, and when I say "out of adjustment," I don't mean there is anything wrong with them. I mean they slack, or the adjustment was within the permissible limit. When they got down here, that, combined with the curve, was the reason why these couplers did not couple. Just the same as if you have both knuckles closed, here, you couldn't couple, either. Now, when they failed to couple, there, Mr. Gilvary reached in. Say the movement was coming down here, and the car, standing car—(illustrating)—reached in, and there is a little grade in the track from the north. That is, the track has got a slight grade, there. I [fol. 33] think Mr. Gilvary will testify that at that particular place it was necessary to put a block of wood under the standing car. There was a block of wood, there, to keep it from running back. When the cars hit and failed to couple, this, of course, jarred these other cars that were standing on the track, back on there a few feet; and without waiting, Mr. Gilvary puts his hand in there; as the slack in these cars came back—that is, they moved back on account of the grade—and caught his arm. Now, that is the way the accident happened, as our evidence will indicate.

The evidence will show that it was impossible for Mr. Gilvary to have signaled the engineer directly—that is, a direct signal to the engineer—because he was located at this curve, here, waiting for the train to come on; and the track curves up around that track, and then it curves up, as it goes into that other track (indicating on map), so that it was necessary for the head brakeman, who was up by the engine, and whose job it is to transmit signals to the engineer, to take signals from Gilvary and transmit them to the engineer. The conductor, who had thrown this switch, was standing around about in here (indicating), with a switch-list, taking a list of the cars as they went by.

Now, that, members of the Jury, is in substance what our evidence will show to have been the facts of this accident. There is no question but what the coupler failed to work; that is to say, in the sense that it did not couple when the attempt was made. There is no question but what Mr. Gilvary was hurt; but there is a very substantial question, as our evidence will indicate, as to how he got hurt, and these various signals, and so forth.

[fol. 34] Now, there is another question in this case. As set up in our answer, the Cuyahoga Valley Railroad Company, being a kind of a plant railroad, has complied in all respects with the provisions of the so-called Workmen's Compensation Law.

Mr. Bernsteen: Now, your Honor please, just—I don't want to interrupt—but just for the purpose of the record, I wish to object at this moment, just for the purpose of the record. You can continue.

The Court: Proceed.

Mr. Kindel: —a law which, as some of you know, provides a method of compensating men who are hurt in the business, in their work. That law was passed, as we claim, according to the provisions of the Ohio Constitution. Now, the law provides that in case of a railroad, as Mr. Bernsteen says, who engages in both interstate and intrastate commerce, and the manner in which the Cuyahoga Valley engages in interstate commerce is occasionally to go to a Baltimore & Ohio interchange and bring in cars which are consigned to the Otis Steel Company. We don't run through the country like a regular railroad does. The law says that, with regard to that kind of a railroad, both it and its employees may secure the advantages of the Workmen's Compensation Law, which is an Ohio law, by filing with the Industrial Commission, which is the commission appointed by law to administer the Compensation Act, an agreement so to be bound. We propose to show in this case that the Cuyahoga Valley railroad complied in all respects with the payment of premiums and that sort of thing, with that Compensation Law; that Mr. Gilvary, when he came to work for the Cuyahoga Valley, and the Company, [fol. 35] when he came to work agreed with him that, in the event of accident or injury where they were engaged as here, in intrastate commerce, Mr. Gilvary would be paid such compensation as the law of Ohio requires to be paid, and the railroad company would pay him that compensation which the law of Ohio requires to be made. And the Cuyahoga Valley railroad, I will say this to you, has been, and now is, ready and prepared to pay Mr. Gilvary, to the last dollar, the amount that the State of Ohio has said should be paid.

Mr. Bernsteen: Your Honor please, I object to that statement, your Honor please.

The Court: Well, perhaps that statement goes too far.

Mr. Kinder: Well, your Honor, I will withdraw the matter, and you can instruct the jury to disregard it.

The Court: The jury will disregard the statement.

Mr. Kinder: Because the question will probably come up during the case, anyway. Now, the Compensation Act which I have set up here, we have set up in the answer was designed to cover just this kind of an accident, just this kind of an injury. The plaintiff, however, claims that there was violated a federal law that is, a law of the United States and claims, therefore, that the Ohio law and the Ohio Constitution don't apply, so that the case, in the last analysis, on the matter of fact gets down to a very narrow point, and that is, Was this coupler defective?

Now, I claim, and shall claim to his Honor probably more properly, later that it doesn't make any difference about that; that the law of Ohio governs, but that even if the law of Ohio doesn't govern, I propose to show by the [fol. 36] evidence that this coupler was both of these couplers were in perfect condition, and the evidence in that regard will be, in brief, as follows: Immediately after the accident, that is to say, Mr. Gilvary was taken to the first-aid room of the Steel Company and given first aid, and very promptly taken over to Lakeside hospital or, no what was the name of it?

Mr. Bernsteen: St. Luke's hospital.

Mr. Kinder: St. Alexis?

Mr. Bernsteen: St. Luke's.

Mr. Kinder: St. Luke's hospital, where he has been, and has been, while he was there, provided with medical attention, medical and surgical attention and hospital attention. Immediately after this accident happened, upon its being reported to the foreman, the foreman got a car inspector and went back to where these two cars stood on this curve, and on account of the accident, and in an endeavor to ascertain whether or not the appliances were in any ways defective, they inspected that coupler on the B. & O. car, and that coupling on the Pee-Mickey car. There was no defect in the couplers; nothing broken; nothing wrong; metal parts were all right. The play in the draw-bars that I

have said, this permissible play was about three inches, which is allowable and necessary, and the coupling was made there. The cars were pulled apart, but prior to this inspection, which was made by three men, the car inspector and the foreman, and by adjusting the draw-bars to accommodate themselves to the curve a little, so that they would be in line, they backed in, the coupling was made, the pin dropped, and they hooked; went on with their work. Now, the next morning, in order to check the matter out [fol. 37] by actual running tests, they took these cars down on what is the "scale" track. That is, these same two cars, because couplers when couplers don't work, why, railroad companies want to know why, on account of this United States law, because they are required not only they are required in penal statutes to have safety appliances in proper condition. The next day they took these two cars, with a different crew, and went down on this track, and they tested as they did the night before, these cutting levers. I will have a model here and show you what these railroad men call the cutting lever and they were all right; and then they tested these couplers by separating the cars and coming together with them, with a running fest. They did that three times, the first time in an ordinary way the thing is coupled; then they pulled it back and came in a little harder, to see whether it would couple automatically by impact, which it did; then they separated them a little further, and as one witness I think will say, "banged into them," like that (indicating)—these cars, with tremendous weight, and the locomotive; and those cars on that occasion were disclosed by those tests, actual running tests, and by examination by the brakeman and the conductor, who knew there had been an accident to Mr. Gilvary, and found to be in what you say "A-100 per-cent" condition. So that, Members of the Jury, it is our contention that, on the facts, here—that is to say, on the merits, the truth of this matter is, that these couplers were in proper condition, met the standard of whatever law applies, because they have a law in Ohio about that, and that Mr. Gilvary is entitled to the compensation only——

Mr. Bernsteen: Now, your Honor please, I object to that, again.

[fol. 38] Mr. Kinder: —under the law of the State.

Mr. Bernsteen: Just a moment, Mr. Kinder. I object, for the purpose of the record, and I object.

The Court: Yes. You have stated your defense once. That will be sufficient.

Mr. Kinder: I would like an exception, if your Honor please.

The Court: Very well.

(The defendant excepts to the ruling of the Court.)

Mr. Kinder: Put it this way:

The Court: State your defense without stating your evidence.

Mr. Kinder: That this these two couplers were in perfect condition, proper condition, and safe to operate, and that, therefore, in this court, the Cuyahoga Valley Railroad Company is entitled to a verdict at your hands.

The Court: Reply statement, Mr. Bernsteen? Any reply statement?

Mr. Bernsteen: Yes, your Honor please.

REPLY STATEMENT ON BEHALF OF THE PLAINTIFF

Mr. Bernsteen: On the Federal Safety Appliance Act, couplers must couple automatically by impact without the necessity of men going between the cars. That is the law. Not why, nor wherefore, nor reason, nor anything at all, but under the Federal Safety Appliance Act they must couple at all times automatically by impact. It isn't a question of defect or not. That is not the law, but they must couple automatically by impact, at all times. That is the Federal Safety Appliance Act.

[fol. 39] Mr. Kinder: I object to that, just on the same basis Mr. Bernsteen objected to my statement, if your Honor please.

The Court: That is the claim of Counsel. Both Counsel are simply making claims.

Mr. Bernsteen: All right.

The Court: They are not evidence, at all.

Mr. Bernsteen: I wish to say further that, under the law, this Federal Safety Appliance Act applies to all states of the Union, and to Ohio, whether there is a compensation law or not.

. . . . . .

The Court: The jury may have a few minutes recess. Counsel remain, please.

(Jury out.)

The Court: The averment of this petition is that at the time of the occurrence in question and prior thereto, the defendant was engaged in both intra- and interstate traffic. The answer denies they were engaged in interstate traffic.

Mr. Bernsteen: I think the defendant will admit that, your Honor.

The Court: Now, the defendant, I understand now in the statement of Counsel, admits that at the time of this occurrence, the defendant was not engaged in interstate commerce. Is that right?

Mr. Bernsteen: But that they were generally also engaged in intgrstate as a railroad, for both commerces.

The Court: I beg your pardon?

Mr. Bernsteen: It was a railroad that engaged in both commerces.

The Court: I beg your pardon?

Mr. Bernsteen: It was a railroad that engaged in both commerces, your Honor please. You admit that, don't you?

[fol. 40] Mr. Kinder: Why, I concede that, on times other than involved, at this occasion——

Mr. Bernsteen: Sure.

Mr. Kinder: —we may have been engaged in interstate commerce; but at the time of this particular accident, we were engaged, and you concede, engaged in intrastate commerce.

The Court: With that admission, very serions question with this Court. I don't know what has been held heretofore on the question, then, of your Federal Employers' Liability Act applying.

Mr. Bernsteen: Federal Safety.

Mr. Kinder: One of the questions in the case.

The Court: With that admission, I will be glad to hear Counsel as to wherein the Federal Liability Act can control.

Mr. Bernsteen: No—Federal——

The Court: At the time, a railroad located wholly within the state, and not at the time engaged in interstate commerce, wherein the Federal Employers' Liability Act can apply.

Mr. Bernsteen: No, the Federal Safety Appliance Act, your Honor please.

The Court: Very well. I will hear you on that.

Mr. Bernsteen: All right. We admit the Federal Liability Act doesn't apply, but the Federal Safety Appliance Act does apply, your Honor please. Your Honor please, it used to be, it was the history of the law, first, that only applied to railroads in interstate commerce, the Federal Safety Appliance Act. Then, by special amendment Congress amended that law so it applied to all railroads, no matter what they were doing at that particular moment, if they engaged at different times in interstate commerce. [fol. 41] Now, I will give you a case right on it, your Honor please. I have sent for a case now. We have here, your Honor, a brief which the Court can have at its leisure.

Mr. Kinder: If your Honor please, I might, along——

Mr. Bernsteen: Now, just a moment, please. In Robertson's—go ahead.

### Defendant's Motion for Judgment

Mr. Kinder: Why, I would like to, in order to put the matter up, here, move for judgment on the opening statement of Counsel. That is, the entire—the statements of both Counsel.

The Court: Very well. You may so treat it.

Mr. Kinder: And just put the issue here.

(Counsel for the Plaintiff thereupon proceeded with his argument to the Court.).

(Thereupon, the jury was excused, under the usual admonition of the Court, until 1:15 P. M.)

(Counsel for the Plaintiff thereupon continued with his argument to the Court.)

### Colloquy

(Counsel for the Defendant thereupon began his argument to the Court; during which argument the following colloquy among Court and Counsel occurred):

The Court: Just a moment, please, Mr. Bernsteen. I want to ask Mr. Kinder a question.

Mr. Bernsteen: Yes.

The Court: You seem to have had this question of the proposed defendant up on the pleading.

Mr. Kinder: Yes. The defense was upheld as against a motion, at least, on the law.

Mr. Bernsteen: That doesn't make any difference. You didn't strike that out. That's all.

[fol. 42] The Court: I want to inquire of Mr. Kinder—assume for this motion, as you now make it, your third defense is denied by the reply, therefore it is not admitted, and it is at issue, in other words. The question is at issue whether or not the defendant complied with what we call the Compensation Law, and that the plaintiff accepted whatever action the defendant took thereunder. That is denied, so you have an issuable fact—an issue as to that.

Mr. Kinder: Mr. Bernsteen will concede that.

Mr. Bernsteen: I concede nothing. You didn't concede anything, I don't concede anything to you.

The Court: Very well, Gentlemen. Let me get at it methodically, if I can.

Mr. Bernsteen: Yes.

The Court: So, for the purposes of this motion, we will not consider your third defense. Now, then, upon the admission of Counsel, here, for the plaintiff, in the statement, as to the work in which this defendant railroad was then engaged, being that of intrastate commerce, what is your claim, if we did not—assuming we did not have the Compensation Act in this state?

Mr. Bernsteen: It makes no difference.

The Court: Wait a minute. I am asking Mr. Kinder.

Mr. Bernsteen: Oh, pardon me.

The Court: Then what is your claim, even then, as to the applicability of the Federal Act, even though the law does regulate both intra- and inter-state commerce? That is, what applicability would this particular statute have in the way of the defenses that a defendant might interpose?

[fol. 43] Mr. Kinder: Well, I would concede that the act would apply here even if we were engaged in intrastate commerce, but only as a measure, as on a question as to the measure of ordinary care, and to that extent only.

The Court: That is what I want to get—your position.

Mr. Kinder: Yes.

The Court: In other words, all the defenses at common law, except those that are specially prohibited, are available to the defendant?

Mr. Kinder: Well, yes, in view of the—well now, hold on, here, a minute, about that. Under the Federal Liability Act, there is an express provision that if you violate the Safety Appliance Act, you are not entitled to a defense of assumption of risk and contributory negligence. Under the Federal Liability Act, I should say, of course, without any question, that the defense of assumption of risk and contributory negligence would not be available, in the event the jury should find that this coupler was defective.

The Court: Defective or insufficient.

Mr. Kinder: Now, along that line, however, if your Honor please, I am not so far as this is concerned in intrastate commerce, I am not prepared to go the whole way, there, and say that, under the Ohio law, if your Honor shall hold that the Compensation Act did not apply, I am not prepared to say that because there was a violation of a Federal Safety Appliance Act, which, in my judgment was merely a standard of duty and merely evidence of negligence, that under that kind of a situation, if the Compensation Act applies, I am precluded from the defense given me under the State of Ohio for assumption of risk and con- [fol. 44] tributory negligence, although the Norris Act does say, as I recall it, that contributory negligence and assumption of risk now, I am speaking solely from memory here doesn't apply with regard to a safety violation but I think that means an Ohio violation.

The Court: Certain specific violations are enumerated.

Mr. Kinder: Yes. Now, if your Honor will indulge me just a moment, here, in order to get me square with Mr. Bernsteen; when he says I will admit nothing, I want to see just where I am "at" here.

Mr. Bernsteen: Leave the Court read all the conversation had between you and myself, before Judge Kramer, and we won't have to argue this case. I have had it all written up. You have had it all written up.

Mr. Kinder: Now, wait.

Mr. Bernsteen: All the argument and all this case went through, verbatim, written down two months ago—the same conversation. Now, read it all.

Mr. Kinder: I am going to read it all, but you raise the question in my mind about where I am at on my defense, if you admit nothing, because you have conceded, as far

as—at the last trial of the case, Max. You remember that. (Reading:)

"1. Subject to the right of an objection on the ground of relevancy, competency, and materiality, plaintiff concedes that on and prior to the date of the accident to the plaintiff, the defendant, the Cuyahoga Valley Railway Company, had complied with the so-called Workmen's Compensation Law of the State of Ohio.

"2. That there was on file with the Industrial Commission of Ohio, an agreement known as the Acceptance and [fol. 45] Notice of Election by Employer and Employees, under Section 51 of the Workmen's Compensation Act, signed by the plaintiff, John Gilvary, and by the employer, the Cuyahoga Valley Railway Company."

I will concede that.

Mr. Bernsteen: How?

The Court: Now, wait, Mr. Kinder, if you want to get your question before me, because I don't have that here.

Mr. Kinder: No, but the reason I am raising this question here is, I want to know whether the same concession about the facts are going to be made here, because if it isn't, the Industrial Commission at Columbus is some miles away.

Mr. Bernsteen: Well, I told you I would admit at the last trial you complied with the Act—and you did comply with the Act. I don't care.

Mr. Kinder: Well, you don't raise any question about this?

Mr. Bernsteen: No. That's all right.

Mr. Kinder: I was thinking about my own defense.

The Court: Well, get your record, because you are going to have this Court, maybe—I wouldn't determine, now, from the state of your record—in other words, to make it explicit, so far the defendant has only admitted that the—I mean the plaintiff has only admitted that the defendant, at the time of the commission of this act was engaged in intrastate commerce. That is the only admission. Now then, you are raising the question here by your motion, that involves not only that question but it involves your defense. Now, your third defense here, setting up as you

do compliance with the Workmen's Compensation Act and [fol. 46] acceptance thereof on the part of the plaintiff, are not yet before this Court. If you want to get the whole question before me, make your stipulation so I can get it.

Mr. Kinder: Well, the stipulation here may be considered as a part of my opening statement, in which it was admitted, by you, subject to——

Mr. Bernsteen: What is your stipulation? Read it.

The Court: In fact, that is a withdrawal of the reply to your third defense, is what it is, or no denial.

Mr. Bernsteen: No.

Mr. Kinder: This is the same stipulation that we had before. There it is, written right out. I read most of it.

Mr. Bernsteen: What is the stipulation?

Mr. Kinder: Well——

Mr. Bernsteen: "Subject to the right"

Mr. Kinder: Yes. I am incorporating, for the purpose of the record, in my opening statement, this fact these facts:

"Subject to the right of an objection on the ground of relevancy, competency, and materiality, plaintiff concedes that on and prior to the date of the accident to the plaintiff, the defendant, the Cuyahoga Valley Railway Company, had complied with the so-called Workmen's Compensation Law of the State of Ohio."

That's conceded.

"2. That there was on file with the Industrial Commission of Ohio an agreement known as the Acceptance and Notice of Election by Employer and Employees, under Section 51 of the Workmen's Compensation Act, signed by the plaintiff, John Gifyary, and by the employer, the Cuyahoga [fol. 47] Valley Railway Company.

"3. That such agreement, known as the Acceptance and Notice of Election, etc., above referred to, had been filed with and approved by the State Liability Board of Awards, now known as the Industrial Commission of Ohio.

"4. That Defendant's Exhibit 2 is a true and correct copy of the agreement above referred to."

Now, I would like to incorporate that in my opening statement, and, subject to objection on account of relevancy, competency, and materiality, why, you concede those facts?

Mr. Bernsteen: Yes. I concede that is his signature.

Mr. Kinder: Yes.

Mr. Bernsteen: I concede that is his signature. That is all.

The Court: You don't go far enough with this Court yet, Gentlemen. The reply to your third defense, the second paragraph thereof, is this: "Plaintiff, for reply to the third defense, for want of knowledge denies the defendant complied with the Workmen's Compensation Law of Ohio. Further denies that plaintiff at any time accepted the provisions of that law, or subjected himself to the operation thereof." Now, the latter part, of course, is a conclusion. The other, "Further denies that he at any time accepted the provisions of that act,"——

Mr. Kinder: That is a legal conclusion.

The Court: —is a matter of fact. That question——

Mr. Bernsteen: I still deny it.

Mr. Kinder: It appears here.

[fol. 48] Mr. Bernsteen: I just admit he signed the paper: That is all I admit.

The Court: I can't compel you——

Mr. Kinder: Yes.

The Court: I am trying to get the matter before me, so I can decide each question.

Mr. Kinder: Well, will you concede, just as I said?

Mr. Bernsteen: I concede that is his signature.

Mr. Kinder: And that he signed it?

Mr. Bernsteen: That is his signature.

Mr. Kinder: Well, does that mean you concede he signed it?

Mr. Bernsteen: I just admit that that is his signature. That is all.

Mr. Kinder: I don't know how it could be his signature without him having signed it.

Mr. Bernsteen: I just concede that is his signature.

The Court: Well, it may be before this Court, you will have to meet that question later on, when you get into your case, but if you want to put the law question before the Court at this time——

Mr. Kinder: That is what I want.

The Court: —you will have to put it in more concrete form, Gentlemen. You only give me half of your question, and I may say, in a way, from what you have said to me,

you have had two very good Judges apparently coming to divergent conclusions. Necessarily, Judge Wolfe, in his overruling of the motion to strike out this third defense, has held one way. Judge — who is he, heard the case?

Mr. Bernsteen: Judge Kramer.

[fol. 49] The Court: Judge Kramer perhaps, I don't know what he did. He evidently allowed your case to go to a jury on that issue.

Mr. Kinder: No.

Mr. Bernsteen: No. He barred everything out.

Mr. Kinder: He held that all this was without any application.

The Court: He held the third defense was without application?

Mr. Bernsteen: Absolutely.

The Court: Two courts of equal jurisdiction, on both sides of your question.

Mr. Bernsteen: Your Honor please, this question has been decided by dozens of courts this very question, over and over again. We have got the Pennsylvania, New York, Indiana, Massachusetts, California, Illinois, on the very question, your Honor please.

Mr. Kinder: I am not getting into argument, your Honor please. I want to ask the Court: you say we have only gone half way. Now, you mean I suppose you mean

The Court: So far, your motion is to direct a verdict here, on the statement of Counsel.

Mr. Kinder: Yes.

The Court: That is all there is to it. Now, the only statement of Counsel, I think, is, Counsel has admitted that the business in which the company was at the time engaged was that of intrastate, and therefore I will listen to that one question before me now.

Mr. Kinder: No, Max will concede, for the purpose of this motion, the stipulation that we read, there.

The Court: He hasn't done so yet.

Mr. Kinder: Oh, yes. Oh, yes.

[fol. 50] Mr. Bernsteen: I will stipulate that this is the man's signature, and that they complied with the Compensation Act.

Mr. Kinder: Yes, he will——

Mr. Bernsteen: Now, let's see. I will concede——

Mr. Kinder: Here is what I have read.

The Court: Get your concession, Gentlemen.

Mr. Bernsteen: Read it out.

Mr. Kinder: All right.

The Court: The exact language.

Mr. Kinder: You will concede this first one, won't you?

Mr. Bernsteen: What is it?

Mr. Kinder: "Subject to the right of an objection on the ground of relevancy, competency, and materiality, plaintiff concedes that on and prior to the date of the accident to the plaintiff, the defendant, the Cuyahoga Valley Railway Company, had complied with the so-called Workmen's Compensation Law of the State of Ohio."

Mr. Bernsteen: Yes, I will concede they complied with it.

The Court: As alleged in the defendant's third defense?

Mr. Bernsteen: Yes.

The Court: All right.

Mr. Kinder: "2. That there was on file with the Industrial Commission of Ohio, an agreement known as the Acceptance and Notice of Election by Employer and Employees, under Section 51 of the Workmen's Compensation Act, signed by the plaintiff, John Gilvary, and by the employer, the Cuyahoga Valley Railway Company."

[fol. 51] Mr. Bernsteen: I won't concede that.

The Court: Then you haven't yet——

Mr. Bernsteen: I will concede it was a signature to a paper like this.

Mr. Kinder: Well; you conceded that, before.

Mr. Bernsteen: I know, but I will not concede it now.

The Court: Can you go, then, and read the paper at your concession, which he signed—what the contents of the paper——

Mr. Kinder: You will concede that he signed this paper, won't you?

Mr. Bernsteen: I will concede—no—I will concede that is his signature to the paper. That is his signature.

The Court: Gentlemen, that is rather begging the question. He evidently signed the paper, which contains certain matters.

Mr. Kinder: Well, then we will put it this way: Will you concede that that is John Gilvary's signature on Defendant's Exhibit 2?

Mr. Bernsteen: Yes. Yes.

Mr. Kinder: All right. And that Defendant's Exhibit 2 contains—do you want me to read it?

Mr. Bernsteen: Tell us what you have got there.

The Court: Read it.

Mr. Kinder: Contains this: (Reading paper marked Defendant's Exhibit 2):

"Form A-100. Note: This form, after being fully filled out, should accompany the 'Application for Classification of Premium Rating.' Form should also be filled out to cover each new employe."

Headed,

"The Industrial Commission of Ohio, Columbus, Ohio."

[fol. 52] To the side is:

"Section 51 of Compensation Act

(Section 1465-98 G. C.)

The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

"Acceptance and Notice of Election by Employer and Employes under Section 51 of Workmen's Compensation Act"

Below that:

"To the Industrial Commissioner of Ohio:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and

its undersigned employes, working only in this state, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, [fol. 53] hereby elect that their respective rights and liabilities growing out of injury or death to such employes or any of them, or their dependents in case of death, shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employes are engaged in intrastate commerce.

Said employer and employes hereby severally request the Industrial Commission of Ohio to approve their election to operate under the Workmen's Compensation Law of Ohio.

—— (Employer). Employes: (Signed) John Gilvary."

Now, you concede that that paper has been filed with and approved by the state liability board of awards, now known as the Industrial Commission?

Mr. Bernsteen: I will concede that.

Mr. Kinder: Well, we took care of the concession about that, that it complied with the Compensation Law.

The Court: That was agreed.

Mr. Kinder: Yes.

* * * * * * *

(Counsel thereupon continued with the arguments.)

Whereupon, the further trial of said cause was adjourned until 9:15 o'clock A. M., Tuesday, November 10, A. D. 1931.

* * * * * * *

[fol. 54] 9:15 A. M., Tuesday,
November 10, A. D. 1931.

Court met, pursuant to adjournment, and proceeded further with the trial of said case as follows.

The Court: The question now is squarely before the Court on a motion to arrest the case from the jury or for a directed verdict; motion of the defendant. * * *

(Court's opinion omitted.)

The Court: This petition, I observe—and this, by way of premise to Counsel—contains more than one averment.

Mr. Bernsteen: That is true.

The Court: For recovery. There is alleged, allegation of violation of Federal Appliance Act. That is one thing.

Mr. Bernsteen: Your Honor please, we withdraw the rest of them, except that one.

The Court: Well, I noticed that there were many other averments, here.

Mr. Bernsteen: We will withdraw all the averments, your Honor, except that one.

The Court: Well, then, as we get back, you may stipulate that in the record.

Mr. Bernsteen: All right.

ORDER OVERRULING MOTION FOR JUDGMENT

The Court: * * * The holding of the Court at the present time is, that your motion is overruled, and exceptions.

(Defendant excepts to the action of the Court in overruling its motion for judgment on the opening statements of Counsel.)

The Court: And then, will you put into the record, please, what you claim, now, and rely on, under this petition? It may save time.

[fol. 55] STIPULATION WITHDRAWING CERTAIN AVERMENTS FROM PETITION

Mr. Bernsteen: It is stipulated that the following averments be stricken from the petition.

Mr. Kinder: You mean "withdrawn."

Mr. Bernsteen: Withdrawn from the petition.

"Defendant was negligent in starting said train into movement while plaintiff was between the ends of said cars.

"Defendant was negligent in failing to warn or apprise said plaintiff of its purpose of then and there starting said train into movement.

"Defendant was negligent in failing to keep said train at a standstill until this plaintiff had given a signal for the movement of the same.

"Defendant was negligent in starting said train into movement and moving the same without any signal being given for said movement by this plaintiff."

Your Honor please, that leaves it down to the one averment in the petition, as to the violation of the Safety Appliance Act.

The Court: In other words, if I follow you, Mr. Bernsteen, you leave in the averment, the defendant was negligent in using said car when it was not equipped with couplers, and so on that is left in?

Mr. Bernsteen: Yes. That is left in.

The Court: Now, beginning with, "Defendant was negligent in starting said train into movement that is where you begin to strike out?

Mr. Bernsteen: Yes.

The Court: And you strike out

Mr. Bernsteen: The rest of that paragraph.

The Court: the rest of that whole paragraph?

Mr. Bernsteen: Yes.

[fol. 56] Mr. Kinder: That leaves us down to this one question, of whether this coupler was defective.

The Court: I take it.

Mr. Bernsteen: Violation of the Safety Appliance Act.

* * * * * * *

Mr. Bernsteen: What about the second and third defense? They should be withdrawn, also, should they not?

The Court: Well, at the present time I see no necessity for your getting into that, till you reach the defense.

Mr. Bernsteen: Until all right, your Honor.

The Court: You probably will have this question fully determined by then.

Thereupon the jury resumed its place in the jury-box, and the trial proceeded further as follows:

* * * * * * *

Thereupon, the plaintiff, to maintain the issues on his part to be maintained, offered the following evidence:

PLAINTIFF'S EVIDENCE

JOHN L. GILVARY, the plaintiff, produced, sworn, and examined as a witness in his own behalf, testified as follows:

Direct examination.

By Mr. Bernsteen:

Q. What is your name, please?
A. John L. Gilvary.
Q. And where do you live, Mr. Gilvary?
A. 3277 East 139th.
Q. In the city, here?
A. City.
[fol. 57] Q. And how long have you lived at that place?
A. Fifteen years.
Q. How old are you now?
A. Forty-six, last birthday.
Q. And how old were you when you were hurt?
A. Forty-four.
Q. On April 17, two and a half years ago?
A. Forty-four.
Q. On April 17, 1929, for whom were you working?
A. Cuyahoga Valley Railroad.
Q. And how long had you been working for them?
A. Eight months.
Q. Had you any other training as a railroad employee prior to that time?
A. Twenty-three years, all told.
Q. Had you ever worked for the Pennsylvania railroad?
A. Yes, sir.
Q. How many years?
A. Thirteen.
Q. What kind of position did you have with the Cuyahoga Valley Railroad?
A. Yard switchman.
Q. On the day in question, at what time did you go to work?
A. Four o'clock. Four P. M.
Q. And to what hour were you supposed to work?
A. 12:00 M. 12:00 midnight.
Q. And what were they called—first, second, or third trick?
A. Second.
Q. Each trick, they call eight hours in railroad work, is it?
A. (No response.)

Q. In those yards, you have what you call a Slab Yards, have you not?

A. Yes, sir.

Q. How many tracks are there in the Slab Yards?

A. Two, and a running track.

[fol. 58] Q. What are the two tracks?

A. East and west slab-yard tracks.

Q. What do you call them—an east slab-yard and west slab-yard?

A. Slab-yard track.

Q. Which is most westerly?

A. The west track.

Q. And just east of that comes the east slab track?

A. Yes, sir.

Q. Off of what track does the east slab track run?

A. Off of the west track.

Q. At what point—the north or the southerly end?

A. The north end.

Q. How do those tracks run—what direction?

A. North-and-south.

Q. And this east slab track—state whether there is any grade to it?

A. Slight grade, yes.

Q. Grade in which direction?

A. North.

Q. Down-grade toward the north?

A. Down-grade toward the north.

Q. State whether or not there is any curve in that track?

A. Slight curve.

Q. On the day in question, at or about—about what time were you injured?

A. About 5:30.

Q. Daylight?

A. Daylight.

Q. About that time, on what tracks had you been working, and just prior to going on the east track?

A. West track.

Q. Did your engine pull off the west track?

A. Yes, sir.

Q. In what direction did it pull?

A. North.

Q. And about how many cars did it pull?

A. About ten or eleven, first time it pulled.

Q. Well, I mean the last time it pulled.

A. About seven.

[fol. 59] Q. About seven?

A. Seven or eight, around there.

Q. When they pulled out the seven cars toward the north, what did you do?

A. Crossed over from the west track and to the east track.

Q. And why did you cross over there?

A. To make a coupling.

Q. What was the move supposed to be?

A. To couple onto that car that was standing there, and shove back in as far as we could.

Q. Now, was there a car standing on that east track?

A. Yes, there were two right there.

Q. And what was the most northerly car?

A. Hopper.

Q. A hopper car? Was that the car on which they were to couple onto?

A. Yes, sir.

Q. And what kind of a car was it—a wooden car, or a steel car?

A. Steel.

Q. And what was the name of that car?

A. "Pee-Mickey."

Q. A Pee-Mickey car? That is the name the men used out there, was it?

A. Yes, sir.

Q. What was the leading car of this cut of cars that was to back in and couple onto this Pee-Mickey car?

A. B. & O. gondola.

Q. And was it loaded or empty?

A. Empty.

Q. Loaded with what?

A. Lumber.

Q. That was the most southerly car, was it?

A. Yes, sir.

Q. Of the cut?

A. Yes, sir.

Q. That was the leading car?

A. Yes, sir.

Q. Which way did the engine face?

A. North.

Q. And these six or seven cars were attached to the rear end?

A. Yes, sir.

[fol. 60] Q. The southerly end?

A. Yes sir.

Q. And when this cut was to be moved, was it to be moved forward or backward by the engine?

A. Backward.

Q. That is to say, the engine was to back back, to couple onto this standing car?

A. Yes, sir.

Q. How many couplers are attached to each car?

A. Two.

Q. And where are they attached?

A. At each end; center of the car, and at each end.

Q. And what does a coupler consist of?

A. Draw-bar, lock-pin, knuckle-pin, and knuckle, and cutting lever.

Q. And where is the draw-bar—where does that extend to?

A. Back under the car.

Q. And the end comes out at the middle of the end of the car?

A. Yes, sir.

Q. And what is attached to the end of the draw-bar?

A. A knuckle.

Q. This knuckle? And how is a knuckle opened?

A. By a cutting-lever. By a lever.

Q. And where does that lever extend—from where and to where?

A. To the outside of the car.

Q. And from where?

A. The center, and the draw-bar.

Q. And to what is it attached?

A. To the lock-pin.

Q. To the lock-pin? Now, when a lever is taken hold of, the cutting-lever, and it is pulled or jerked up and down, what does that do with the lock-pin?

A. It raises it up.

Q. And then what? When the lock-pin is raised up, what happens to the knuckle?

A. It opens.

[fol. 61] Q. When couplings are to be made, how many knuckles must be open?

A. One is sufficient.

Q. One is sufficient, is it? Is that the usual way?

A. Yes, sir.

Q. How do these knuckles work, as to coupling?

A. By impact, automatically.

Q. And what do you mean, "automatically by impact"?

A. Why, you open them with this lever, and when they come back against each other, they couple themselves. Not supposed to be in between them.

Q. When you open them with this lever, must you go between them in any way?

A. No, sir.

Q. That is to say, when the cars come back by impact, they couple themselves automatically, do they?

A. Yes, sir.

Q. What did your crew consist of at that time?

A. Two brakemen, conductor, fireman, and engineer.

Q. Who was your fireman?

A. I think his name was O'Brien.

Q. And who was your engineer?

A. Cornell.

Q. Who was your conductor?

A. Melvin.

Q. Who was the head man?

A. Skuce.

Q. And who was the rear man?

A. Myself.

Q. Where is it the head man's duty to work, usually?

A. Out near the engine.

Q. And where is the rear man's work?

A. At the rear of the train.

Q. And that was your job, was it?

A. That was my job.

Q. Who has control or charge of the crew?

A. Conductor.

Q. Now, in order to go from the west track onto the east track, is there a switch there?

A. Yes, sir.

[fol. 62] Q. Who threw that switch for that movement backward?

A. Melvin.

Q. The conductor?

A. The conductor.

Q. Where did you stand, or where did you keep your position?

A. At the east side of the car, northerly end of the standing car, on the east track.

Q. That is, the Pee-Mickey car?

A. Yes, sir.

Q. Was that coupler opened or closed?

A. Opened.

Q. Who had opened it?

A. I don't know. It was open.

Q. When this cut of six or seven cars came back—and the leading car, you say, was the B. & O. car—is that right?

A. Yes, sir.

Q. ——to couple onto the car you were standing at——

A. Yes, sir.

Q. ——what did you do, as they came back?

A. When they got within about a half a car-length, I steadied them up with a signal.

Q. Did the cars come back?

A. Yes, sir.

Q. Did they come together?

Q. Yes, sir.

Q. Then what did you do?

A. As they came together, I swing them down.

Q. You swung whom down?

A. The engineer.

Q. Could you see the engineer from your position?

A. Yes, sir.

Q. What happened to the coupling?

A. It didn't "make." The knuckle closed.

Q. When you say they didn't "make," you mean that they failed to couple?

A. Failed to couple.

Q. What happened to the coupler on the standing hopper car?

A. Closed.

Q. Then what did you do?

A. As they hit, they knocked the cars, so I blocked the cars.

[fol. 63] Blocked which car?

A. The hopper car.

Q. The car that had been standing?
A. Yes, sir.
Q. Which way had it been knocked, or bumped?
A. South.
Q. Then what did you do?
A. I got up and opened the knuckle. That is, I got hold of the cutting lever, and I couldn't open it with one hand, which is the usual way, so I got the two, and attempt—shook it three or four times, and it finally came open.
Q. That is to say, you say you got hold of the lifting-lever of the standing car?
A. Yes, sir.
Q. First, with one hand?
A. Yes, sir.
Q. Then, with both hands?
A. Yes, sir.
Q. Did you open the knuckle?
A. Yes, sir; finally came open.
Q. At that time, where was—what was the knuckle of the other car—closed or open?
A. Closed.
Q. Then what did you do?

Mr. Kinder: At what time, Mr. Bernsteen?
Mr. Bernsteen: Just after he opened the coupler on the standing hopper car.

Q. Was it also closed when they came back that first time?
A. Yes, sir.
Q. And that is the usual way of coupling, is it?
A. Yes, sir.
Q. Now, after you opened up the knuckle on the standing hopper car, what did you do?
A. I signaled the engineer to back up.
Q. Did he come back?
A. Yes, sir.
Q. Did they "make"?
A. No, sir.
Q. What happened?
A. Knuckle closed again.
Q. The same knuckle?
A. Same knuckle.
[fol. 64] Q. What did you try to do then? Did you try to open it?

A. I blocked the car.
Q. Did you try to open it, then?
A. Yes, sir.
Q. How did you try to open it?
A. With the lever.
Q. The same lever?
A. Same cutting-lever.
Q. Before I forget, now, is there a lever on each, on both sides, or only on one side of the car?
A. One side.
Q. Now, was there also a lever on the standing B. & O. car?
A. On the west side.
Q. On the west? I mean, on the west side.
A. Yes.
Q. Not on your side?
A. No.
Q. All right. Now, you say you tried to open the lever on the standing hopper car again?
A. Yes, sir.
Q. With the lifting-lever?
A. Yes, sir.
Q. Were you able to open it?
A. No, sir.
Q. Then what did you do?
A. Well, I decided that I would try, go in between it and open it, so I swung the engineer down again.
Q. What does that mean for the engineer?
A. Indicates that you are going to work in between those cars.
Q. Then what did you do?
A. He answered me.
Q. Then what did you do?
A. I got in and tried to open the standing car.
Q. How?
A. With the lever, with the lock-pin.
Q. With your hand, you mean?
A. Yes, sir.
Q. Put your hand in between the cars?
A. Yes, sir.
Q. Were you able to open the coupler with your hand?
A. No, sir.

[fol. 65] Q. Then what did you decide to do, or did you do?

A. I decided then I would line up, open the B. & O. car.

Q. And what did you mean, when you say "line up and open"?

A. Pull the draw-bar across to you, and line it up.

Q. Well, was it in line at that time?

A. No, sir.

Q. And what do you mean, it wasn't "in line"?

A. By those two impacts, it was knocked out of line.

Q. What is the usual alignment or usual allowance given to an ordinary coupler, in draw-bar?

A. About two and one-half inches.

Q. How far was this draw-bar out of line?

A. About six or eight.

Q. Would they have been able to couple in the condition they were in at that time?

A. No, sir.

Q. And why not?

A. They were out of line.

Q. After they had got in line, what did you intend to do?

A. Open the knuckle.

Q. Was there a lifting-lever on your side of that coupler?

A. No, sir.

Q. On the other side?

A. On the other side.

Q. Now, what did you do?

A. I got hold of the drawbar to pull it over. About the time I got the weight on my arms, they backed up on me.

Q. Now, which arm did you have in there?

A. Left arm.

Q. Which car came back?

A. The B. & O.

Q. What happened to your arm?

A. It was coupled up between the two.

Q. Then what did you do?

A. Why, I tried to get my glove off, to reach out and give the engineer a signal, but in the meantime, they went [fol. 66] apart enough and my arm came out—dropped out.

Q. Which car moved?

A. The B. & O.

Q. Moved back toward the engine?

A. Yes, sir.

Q. There was down-grade toward the engine, there, is there?

A. Yes, sir.

Q. Then what did you do?

A. As I came out, at the end of the car, the conductor just about got there at that time, and I had my arm, hold of my hand like this (indicating), and I said to him, "Tie me up, my arm is off." And he got—he kind of snickered, at first—kind of laughed, as though it was just—then I says to him, "For Christ's sake! tie me up. My arm is off." Then he saw the blood. He got all excited. He couldn't do anything for me.

Q. Had you ever coupled cars at that point before?

A. Yes, sir.

Q. Now, what was done, then?

A. He called a colored fellow over from the yard, there, from the scrap yard, where there was shipping steel, and this man tore some of his clothes off and tied up my arm.

Q. Anybody else came back at that time?

A. Skuce came back about that time.

Q. And what did he do?

A. He took a handkerchief and tied up my hand.

Q. He was the head man, wasn't he?

A. Yes, sir.

Q. Where did he take you?

A. Emergency hospital, their own hospital—the company's.

Q. And who went with you?

A. Skuce, Melvin, and a foreman there in the mill.

Q. Mr. Skuce and Mr. Melvin, the conductor, went?

A. Yes.

[fol. 67] Q. And then where were you taken from there?

A. St. Luke's.

Q. St. Luke's hospital?

A. Hospital.

Q. Did Skuce go with you? Who went with you to St. Luke's hospital?

A. Skuce.

Q. And where did the conductor go, or do you know?

A. Back to work, I understand.

Q. You don't know where he went?

A. Don't know where he went, no. He was supposed to go back.

Q. How long were you in St. Luke's hospital?

A. Five weeks.

Q. Do you know whether you underwent an operation on your arm in the hospital?

A. Well, I was on the table there for—I went in there at 7:00, around 7:00 o'clock. They told me I got off at 10:30.

Q. Under the anæsthetic all that time?

A. Yes, sir.

Q. How long did you say you stayed at that hospital?

A. About five weeks.

Q. Who took care of you?

A. Doctor Glover.

Q. He is the railroad company's doctor?

A. Yes, sir.

Q. How much longer after that did you treat with Dr. Glover?

A. About three months.

Q. Was anything furnished to you for your protection at any time by Doctor Glover?

A. Furnished me a cuff—had a cuff made for me.

Q. And what was that cuff made of?

A. Leather and steel.

Q. And how big was it?

A. From my wrist to my elbow.

[fol. 68] Q. What was the purpose of that cuff, if you know?

A. To keep my arm together when I walked around, or when I lay down, or anything.

Q. How long did you use that cuff?

A. Still use it.

Q. Did you have any pain in the hospital?

A. Continuously.

Q. Given any medicine?

A. Yes. They gave me some dope, or pills, or something they called it, something that quieted my nerves, to get me to sleep.

Q. Have you received some treatments lately? Have any doctors since you had Doctor Glover?

A. Oh, yes.

Q. Who?

A. Doctor Heym.

Q. What do you do for your arm now—have you been doing, for the last year or so?

A. Bathe it in hot water, exercise it, try to move it around, keep it from getting stiff any more than it is.

Q. Have you any use for your hand or arm below the elbow?

A. No, sir.

Q. How old are you, do you say?

A. Forty-six.

Q. And what were you earning, at the time you were hurt?

A. Two hundred dollars a month.

Q. You have not been able to work since you were hurt, have you?

A. No, sir.

Cross-examination of John L. Gilvary.

By Mr. Kinder:

Q. Mr. Gilvary, I understand that prior to going with the Cuyahoga Valley Railroad you were an experienced railroad man?

A. Actually, twenty-three years.

Q. And therefore are familiar with couplings and railroad operation?

A. Yes, sir.

[fol. 69] Q. Now, this accident, you say, occurred about 5:30?

A. Yes, sir.

Q. And prior to that time, prior to the accident, your engine crew had come from one of these other tracks and backed down here into the west—so-called west track; is that right?

A. Yes, sir.

Q. How many cars?

The Court: Mr. Kinder, for my information, will you give the points of the compass on that map? The right is what?

Mr. Kinder: The north of the map is to the right. The top is west. The bottom is east, and the left-hand is south. If your Honor prefers, I can turn the map up.

The Court: Oh, no.

Mr. Kinder: —in the proper way for a map.

The Court: No, just so we can follow you, is all.

Mr. Kinder: I thought, as long as the tracks are parallel, we had better have it this way.

Q. So your engine with some ten cars, or backing some ten cars, had backed in on that west track; is that right?

A. No, sir.

Q. Well, before you backed in there, how many cars did your engine have hold of?

A. None.

Q. How many?

A. None.

Q. None? So that you came in, then, off of this track, backing up, with your engine light?

A. Yes.

Q. Then you went in on this west track, and must have coupled onto some cars, did you?

A. Yes, sir; coupled the track up.

Q. How many cars did you couple up?

A. I should judge ten.

[fol. 70] Q. And how many couplings did you make to get the cars, altogether?

A. Two.

Q. And who made those couplings?

A. Myself.

Q. And after the couplings were made, what signal, if any, did you give?

A. None.

Q. No signal?

A. No, sir.

Q. Well, then did the cars move out, after you had made the couplings? Did the train, with the engine at the north end, move out of that track?

A. No, sir, not as yet.

Q. Well, then what did they do down there?

A. The conductor came over, after, and gave us what cars to take out of there.

Q. Oh, that is the conductor advised you of the moves that were to be made?

A. No, he made them. He made the cutting, himself.

Q. Well, at any events, you pulled out of there with some cars, did you?

A. Yes, sir.

Q. And did you kick any cars in there after you got hold of them?

A. Kicked three cars out on the running track.

Q. That is, you got hold of these—how many cars did you get hold of, when you came out?

A. I should judge about ten.

Q. Ten? So you came out here with ten cars, your engine first came out here, and along here (indicating), then somebody threw this switch?

A. Yes, sir.

Q. That runs off the running track into the west track, and there was three cars kicked down on this running track; is that right?

A. Yes, sir.

Mr. Kinder: Now, I am going to mark that running track and west track.

Mr. Bernsteen: Go ahead.

[fol. 71] Mr. Kinder: With ink.

Mr. Bernsteen: Red ink.

Mr. Kinder: Oh, we can see this.

Q. Now, Mr. Gilvary, you come down here, so we won't have any question about this. There is the blooming mill. There is the east track, and there is the west track, and there is the running track. Does that look about right to you?

A. Yes, sir.

Q. Now, we will mark that "running track." (Counsel letters the map, accordingly.) "Running track." Now, we will call this track, right here, the west track?

A. Right.

Q. And we will call this the east track?

A. Yes, sir.

Q. Then we will be located. Those tracks are evidenced by two parallel lines. All right, now, Mr. Gilvary, if you will take the stand again, please. So that, after kicking three cars out on the running track, then you came back, somebody threw this switch, didn't they?

A. Yes, sir.

Q. Who did that, do you know?

A. I couldn't say.

Q. I see. And then you moved in on this west track, and did you go into the west track again, then?

A. Threw one car in there.

Q. You threw one car in the west track?

A. Yes, sir.

Q. And when you railroad men say you "throw" one car, you mean that you give her a start and it is uncoupled and the car moves on down by itself?

A. Yes.

Q. Is that right? Now, who was down in this west track to take care of that one car that was thrown down there?

A. Me.

Q. You were the "field man," was it?

A. Yes, sir.

[fol. 72] Q. And they called him the "rear brakeman" or the "field man"?

A. Yes, sir.

Q. And worked furthest from the engine?

A. Yes, sir.

Q. Then there is a head man who works near the engine?

A. Yes, sir.

Q. Brakeman; and then the conductor, around——

A. He is——

Q. Now, after throwing that car down there, did it come to a stop?

A. Yes, sir.

Q. And what was your job over there with regard to that car that you threw in on the west track?

A. To block it, in case it would move.

Q. And did it come to a stop?

A. Yes, sir.

Q. Did you have to get on it to put on the brakes?

A. No, sir.

Q. And it came to a stop, itself, did it?

A. Yes, sir.

Q. And did it stay there all right?

A. Yes, sir.

Q. Did you block it?

A. No, sir.

Q. How far down would you say that car went on the west track from this switch which leads from the west track into the east track? How far down this way?

A. About two or three car-lengths.

Q. Two or three car-lengths? You call a car-length about fifty or forty feet?

A. Well, about that.

Q. Average?

A. Averages that.

Q. So that went down there about 150 feet. Then you came across to the east track, did you not?

A. Yes, sir.

Q. And the reason you came across to the east track was because the conductor had told you or advised you in some way that the next move would be to couple onto those two cars standing on the east track?

A. Yes, sir.

[fol. 73] Q. Now, were the two cars that were standing, the first being what you railroad men call a "Pee-Mickey" car, were those two cars coupled together?

A. Yes, sir.

Q. Now, were there any other freight cars on the east track, south of where those two cars were?

A. Yes, sir.

Q. How many, about, do you know?

A. One under the chutes.

Q. Yes?

A. And I couldn't say how many behind it, but there was some behind the chutes.

Q. Several, anyhow?

A. Yes. They laid in there.

Q. And if the accident hadn't occurred, you would have coupled onto there, and then shoved back and coupled the whole track, would you?

A. No, sir.

Q. What were you going to do?

A. Put cars back, so as we wouldn't hit the car under the chute—sufficient for a man switching, when we came back.

Q. Were you going to take these two cars that were standing there and put them out, and put them on the west track, while you put your empty cars in?

A. No, sir.

Q. I see.

A. Not then.

Q. Well, when you backed in there, the engine had six or seven cars, you say?

A. Yes.

Q. The first one, the southerly one was this B. & O. car?

A. Yes, sir.

Q. And the movement was that you were to move in on this and couple onto this Pee-Mickey car, is that it?

A. Yes, sir.

Q. And then what were you going to do, then?

A. Back down as close as we could to the chute.

[fol. 74] Q. To the chute? I see. And then what were you going to do?

A. Leave those cars in there that we could leave in, the east track.

Q. Yes?

A. To clear the west track.

Q. I see. You were going to get just as many cars in on that track as you could?

A. Yes, sir.

Q. And what you couldn't, you were going to cut off, and what were you going to do with them?

A. Put them on the west track.

Q. Pull them out again and put them on the west track, is that right?

A. Yes, sir.

Q. Then, as I understand it, you were arranging so that you would have your empty cars spotted back along this slab mill; is that right?

A. Four to spot back there, in the switching.

Q. And the loaded cars, what you railroad men called "first-out", is that right?

A. No. We would switch the track and get them out, and have the empty cars to put right in there.

Q. Yes. Well, then, what would you do with the loaded cars?

A. Throw them out on the running track.

Q. On the running track? Now, as you come off of the running track onto the west track, the switch-point here, there is a curve in that track, where it straightens out, isn't there?

A. Slight curve; yes.

Q. And as you came out of the west track onto the east track, there is a curve right there, isn't there?

A. Slight curve.

Q. And this Pee-Mickey car was standing, the end of it, right on the curve, wasn't it?

A. Just about on the curve.

[fol. 75] Q. So that when the coupling was made, it would be made when the knuckles came together, the two cars would each be on the curve?

A. Yes, sir.

Q. Yes. Now, you say there is a grade to the north. That is, it is down-grade on the east track, to the north?

A. Not all the way.

Q. Not all the way? It is down-grade to about the curve, isn't it?

A. It grades north from a little ways back from the curve, from that chute back it is——

Q. Well, it is down-grade to the curve?

A. To the south.

Q. I understand, from the chute, south?

A. Yes.

Q. But I am talking, from the chute north, down into the curve, the grade is down?

A. Just about a little level till it hits about the curve, then it grades down.

Q. Yes, and the grade is a little down to the south, from the north to the curve, isn't it?

A. No, sir.

Q. Why, I understood you to testify at the former trial, here, that the cars, at the point where the coupling was attempted, were both down-grade to the curve.

A. Yes, sir.

Q. Well, that is the fact, then?

A. Yes, sir.

Q. Isn't it? Well, then, that is what I thought.

A. The car from the south—but the car, the standing car, points towards the north.

Q. I understand that.

A. The other car points towards the——

Q. Exactly; so that, on the curve, as the two cars came together, it was slightly down-grade toward each other, on that curve?

A. No, no, no. I didn't testify to that.

Q. Well; what I want to get is the fact here.

[fol. 76] Mr. Bernsteen: Get what it is now. I haven't got what it is now, yet.

Mr. Kinder: Well, let's see. Maybe I don't understand Mr. Gilvary, and maybe he don't understand me. I am talking——

Q. Do you remember this question being asked? "I am talking about the car onto which you attempted to couple. Answer: The one car, yes." This is my question, before.

A. Yes, I understand it.

Q. "Question: So, when this Baltimore & Ohio car came down here, it was on a curve, and both cars were on a little grade down towards each other? Answer: Yes, sir."

A. Well, that is what they would be—towards each other. They couldn't be the opposite way.

Q. Well, that is what I—you misunderstood me. What I am getting at, you take these two law books as cars, and when this B. & O. car and this, the standing Pee-Mickey car, as the cars came down here, and on a curve, these cars were down-grade towards each other?

A. No, sir.

Q. Well, what is this, then? "So when the Baltimore & Ohio car came down here, it was on a curve, and both cars were on a little grade down towards each other?"

A. Yes, that car is down a little to the other. It isn't going down south, or it is going up south, and the other one is coming down north. That puts them on a grade to each other, doesn't it, or does it not?

Q. Well, I supposed when you said——

A. I am not an engineer. I am only a railroad man.

Q. Now, let us see if we can clear this up, because I think it is a matter of some importance. "Well, you mean where [fol. 77] this coupling was being done, was it up hill from there south? Answer: Yes, sir." Is that correct?

A. To the south.

Q. No, it says "up hill from there south."

A. Right.

Q. All right. Yes, sir. Yes, sir. "So that these two cars, both kind of laid a little down-grade, did they?"

A. Yes, sir.

Q. Do I understand you to say that this east track is higher on the south end than it is on the north?

A. Yes, sir.

Q. So that it is down-grade from the south to the north?

A. Yes, sir.

Q. There isn't any question about that, now, is there?

A. Yes, sir.

Q. And that is the reason they had to block those cars, so they wouldn't run out on that track?

A. Yes, sir.

Q. So that the Pee-Mickey car, as it stood there, was down-grade, wasn't it, towards the north?

A. Towards the north.

Q. Yes. "So that these two cars both kind of laid a little down-grade, did they?" Answer: "The rear car didn't: The southerly car laid a little more on the level."

A. Yes, sir.

Q. Now, you are speaking about the southerly car of these two cars that were standing there?

A. Yes, sir.

Q. All right. So that the southerly car laid more or less on the level, and this car was a little down-grade?

A. Yes, sir.

Q. How?

A. Yes, sir.

Mr. Bernsteen: "This car"—you mean the "Pee-Mickey" car, don't you?

[fol. 78] Mr. Kinder: Yes.

The Witness: Now, those are the standing cars you are talking about?

Mr. Kinder: Those are the standing cars. "I am talking about the car onto which you attempted to couple." Question. Answer: "The one car; yes." Then I said, "So, when this Baltimore & Ohio car came down here, it was on a curve, and both cars were on a little grade down towards each other?"

A. Correct—down towards each other.

Q. Well, do you still say, then—or what is the fact? When the Baltimore & Ohio car came in there, was it going down hill or up hill?

A. Up hill.

Q. Or was it on the level?

A. Up hill.

Q. Up hill?

A. Up hill.

Q. Well then what did you mean by this answer: "So when the Baltimore & Ohio car came down here, it was on a curve, and both cars were on a little grade down towards each other"?

A. This way (indicating)—towards each other. Not down in the hole—this way—towards each other.

Q. Then I asked you this: "Is that right? And this second car was kind of up over a little hump?" And, answer: "Just on top of the hump."

A. Yes.

Q. Is that right?

A. Yes.

Q. You say the conductor gave the signal, or threw this switch?

A. Yes, sir.

Q. For these cars to come back? Who gave the signal for this movement back through the switch?

A. Melvin.

Q. The conductor?

A. The conductor.

Q. You saw him give the signal?

A. Yes, sir.

Q. The cars came back slowly?

A. Yes, sir.

[fol. 79] Q. And you were standing there at the north end of this "Pee-Mickey" car?

A. Yes, sir.

Mr. Kinder: Can we agree on these car numbers, Max?

Mr. Bernsteen: Yes, I will agree on them.

Mr. Kinder: It is stipulated in the record that the "Pee-Mickey," which is a P., McK. & Y., was No. 63979, hopper, and the Baltimore & Ohio was 150956, gondola.

Mr. Bernsteen: That is right.

Q. Those are the two cars——

A. Yes.

Q. —between which the coupling was attempted? How long had you been standing over at the north end of that Pee-Mickey car before the cars started to come back through the switch?

A. Oh, I—about a minute or two, all told.

Q. Well, you came right across from the west track to there, didn't you?

A. Yes.

Q. And they had to come up here and make this switch?

A. No, they was out over the switch before I started to cross, even.

Q. It was out, but the conductor turned the switch after, or before you got over here?

A. Just about the time I was coming over.

Q. Well, where do you say you were when he threw the switch for this movement?

A. On the west track.

Q. And then did you come over while these cars were moving down through there?

A. Yes, sir.

Q. Well, how far is it from this switch down to this curve?

A. About two car-lengths.

Q. That is, eighty feet?

A. Around that.

Q. Well, you say you were on the west track when the conductor—when this train moved back through here?

A. Start to move back, yes.

[fol. 80] Q. Well, then you had to hurry some to get over there, didn't you?

A. No, sir.

Q. Well, anyways, you came over this east track and took a position on the southerly side of it?

A. On the——

Q. I mean, the westerly—or the easterly side of it?

A. The easterly side.

Q. Yes. And how long were you there before you gave this steady signal?

A. About a minute or two. I should judge that much, anyway.

Q. Well, did you block the "Pee-Mickey" car?

A. After he hit it.

Q. No, I am getting to that, but did you block the "Pee-Mickey" car after you got over there?

A. No, sir.

Q. Had you blocked the "Pee-Mickey" car, or put any block under it, before you gave this swing-down signal?

A. It was blocked.

Q. Well, then, you had not blocked it? I am asking you whether you——

A. No, I didn't block it.

Q. Yes. Now, how far was this B. & O. car, as it came in there, from the standing "Pee-Mickey" car, when you gave this steady signal?

A. About a half a car-length.

Q. About twenty feet?

A. Around that, or a little more. Around that, anyway.

Q. And you hadn't done anything with the blocking of the car, but had taken your position there and was watching this car come down; is that right?

A. Yes, sir.

Q. You had not touched the lever or anything on that car, had you?

A. No, sir.

Q. On the "Pee-Mickey" car?

A. No, sir.

Q. And you say that knuckle was open?

A. Yes, sir.

[fol. 81] Q. And the knuckle on the Baltimore & Ohio car was closed?

A. Yes, sir.

Q. I want to refer to an exhibit, a model, which may be called Defendant's Exhibit A. This is a model, on a small scale, of an A. R. A. coupler, and that functions, here—that (indicating) is what you mean by a "cutting-lever," is it?

A. Yes, sir.

Q. So that that functions so that when that cutting-lever is pulled up, it pulls this pin up, and this knuckle is opened?

A. If it is in working order, yes.

Q. Now, you say that, as this "Pee-Mickey" car stood there, that day, on that track, which was on a curve, the knuckle was open?

A. Yes, sir.

Q. And the pin was up?

A. Yes, sir.

Q. You hadn't, however, touched it, before this coupling was made?

A. No, sir.

Q. Now, the Baltimore & Ohio car—we will turn it around so as to have it coming in the right direction—came down there with this knuckle closed?

A. Yes, sir.

Mr. Bernsteen: Well, just a moment. "That knuckle"—on what car is that? I haven't got you.

Mr. Kinder: The Baltimore & Ohio car, I say. The Baltimore & Ohio car came down there with that knuckle closed.

Mr. Bernsteen: All right.

Mr. Kinder: This knuckle (indicating) was open, the knuckle on the "Pee-Mickey."

The Witness: On the standing car, yes.

Q. And you had been there at the "Pee-Mickey" car, there, a minute or two?

A. Yes.

Q. Maybe longer?

A. About a minute or two, anyway.

[fol. 82] Q. Maybe longer, I say?

A. I couldn't say whether longer or not.

Q. I see. And you saw that the pin was up and the knuckle was open?

A. The knuckle was open. I can't say the pin is up, because they don't all stay up. I can't tell.

Q. I thought you just said a minute ago to me that the pin of that car was up, and that you saw it?

A. If it's that model, yes.

Q. I am not referring to this model. I am referring to the car back here, a little while ago, when I asked you, as you stood there, you saw the knuckle was open and the pin was up, and I understood you to say to me that you saw the pin was up.

A. The pin was up.

Q. Yes.

A. Yes.

Q. All right, now, that pin is up, and the knuckle is open. You could see that as you stood there?

A. Yes.

Q. As you stood there during that time and observed that knuckle open, did you see anything wrong with that coupler—anything broken?

A. Had no occasion to look at it, outside of the knuckle was open. That's all we would care about, when we walk—coupling.

Q. I see. Well, to the extent that you saw it, did you see anything broken or out of order about that "Pee-Mickey" coupler?

A. No, sir. Had no occasion to look at it.

Q. All right. Well, you looked at it to the extent of seeing whether it was open or not?

A. That is what your duty is.

Q. Why, of course. You wanted to know whether that was open, because you could see the B. & O. car was closed?

A. I have to see that is open.

[fol. 83] Q. Certainly, so that, in ascertaining whether that knuckle was open or not, you stood within what—two feet of it?

A. Two and a half, three feet.

Q. Yes. It was right before you?

A. Yes, sir.

Q. How big is a coupler, the housing and everything?

A. Well, I can't give you the exact number, but I don't believe that any five of us in here could carry it.

Q. Well, then, it must be eight or ten times bigger than this, isn't it?

A. Oh, yes, yes.

Q. How?

A. Yes.

Q. So that it must be twelve or fourteen inches across, and twelve or fourteen inches this way?

A. Yes.

Q. How? And this knuckle, here, must be eight or ten inches, isn't it?

A. Yes. It is around that.

Q. So that you stood within two feet and a half of that car, charged with a duty of ascertaining whether the thing was open, and to the extent that you looked at it you couldn't see that there was anything wrong or broken about it, could you?

A. No, sir.

Q. Now, let us turn for a minute to the Baltimore & Ohio car. It came down towards you, slowly, and when it got within twenty feet of you, you gave a steady signal?

A. Yes, sir.

Q. Which was the proper thing to do under the circumstances?

A. Yes, sir.

Q. And the engineer answered that signal?

A. He did.

Q. That is by "steady," he kind of slowed her down?

A. He kept steadying her up a little, about the time he hit.

Q. And at that time, when you gave that signal to the engineer, did you give it directly to the engineer?

A. Yes, sir.

[fol. 84] Q. And you could see him, his head sticking out of the cab, could you?

A. Yes, sir.

Q. Did you see the head brakeman up there?

A. Yes, sir.

Q. Did he relay the signal?

A. No, sir.

Q. Did you see the conductor?

A. Yes, sir.

Q. Did he relay the signal?

A. No, sir.

Q. That is to say, as you stood there you could have that engineer, in the cab, in plain view?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And after giving that signal he steadied her up?

A. Yes, sir.

Q. And did the cars come together?

A. Yes, sir.

Q. Rather slowly?

A. Yes, sir.

Q. Easily? Easily, would you say?

A. Well, not easy.

Q. Well, it isn't like a passenger train coupling?

A. Oh, no.

Q. But it came together——

A. What do you mean, "easy"?

Q. Well, at the proper rate of speed, didn't it?

A. Yes.

Q. How?

A. Yes.

Q. That is, the engineer properly obeyed your signal, and it moved down there in the usual operation, when they came together?

A. Yes.

Q. Now, that coupler was closed. Now, these couplers, the knuckle and the housing are really a head-end of a draw-bar, aren't they? That is, they are a part of a draw-bar. They are the end of a draw-bar, aren't they, that goes underneath the car?

A. Yes.

Q. And this draw-bar has certain play in it, necessarily?

A. Yes.

[fol. 85] Q. And the reason for that is because the railroad car has got to go around the curves. Is that the reason for it?

A. Not necessarily.

Q. Well, that may be one of the reasons for it?

A. One of the company reasons.

Q. Well, suppose they were rigid, Mr. Gilvary, and locked there; how would a train go around a curve without breaking the draw-bars?

A. I couldn't tell you that.

Q. No. Well, in other words, in the ordinary operation of a railroad, there has got to be some play in the manner, in the appliances—side-play in the appliances which hook the cars together, so that when one car is going around a curve there will be some give in it; isn't that right?

A. You want me to answer that, the way I should?

Q. Why, Mr. Gilvary, I don't—I want you to answer the question. That is what I would like to have you answer. I am asking you whether or not. I will withdraw that for a minute. Then you say there is some play in a draw-bar?

A. Yes, sir.

Q. A permissible play, isn't there?

A. I can't say whether it is permissible or not.

Q. Aren't you familiar with the Interstate Commerce Commission rules and regulations about that?

A. No, sir.

Q. Oh. Well, then—but you answered your Counsel here a little while ago that the allowable play, or the play was two and a half inches. What did you mean by that?

A. Just what I said.

Q. And you mean two and a half inches on each side?

A. Yes. I didn't answer that question that you asked me, to him.

[fol. 86] Q. Well, let us put it this way: in all the freight cars that you ever handled, and which were in good condition, they all had play in the draw-bars, didn't they?

A. Yes.

Q. Yes. Now, the play—what is it—two and a half inches on the side?

A. About two and a half inches. About two and a half inches.

Q. On the side?
A. Yes.
Q. On each side?
A. Yes.
Q. So there must be a total four-inch play, from one side to the other, is that right?

Mr. Bernsteen: Five inches. Two and a half inches, he said, didn't he?
Mr. Kinder: On each side.
Mr. Bernsteen: Well, that makes five inches.

Q. Well, was it four or five inches?
A. Around that, yes. Two and a half inches, either way.
Q. Either way?
A. On each side. That would be five inches.
Q. So that, in a coupler, as you have observed it in your years of railroading, this draw-bar is movable from side to side to the extent of two and a half inches from the center?
A. Yes, sir.
Q. As a matter of fact—well, withdraw that. Now, of course, this being a model, why the amount of play in this draw-bar would necessarily be multiplied by the reduced size of the model, wouldn't it?
A. Well, I can't say necessarily.
Q. All right.
A. There must be.

The Court: If you are expecting the jury to give consideration to that, I would suggest that you turn it around so they can see it.
Mr. Kinder: Well, I have been working it, there.
[fol. 87] Mr. Bernstein: What was that question? I didn't get that question, either.
Mr. Kinder: All right; let's have it, please.

(Last question read.)

Mr. Kinder: Well, I was trying to point out, here, and I—probably isn't a proper question—if this model is ten to one, why, this play in here——
The Court: That is a matter of calculation.
Mr. Kinder: Yes. I think the question was a dumb question. I will withdraw it.

Q. Now, you had looked at the Baltimore & Ohio coupler before you gave the swing-down signal, hadn't you—I mean, the steady signal?

A. Yes.

Q. How?

A. Yes. It was coming to me.

Q. And how far away was the car, the Baltimore & Ohio car, from you, when you first noticed that the coupler was closed, as it approached you?

A. Well, that's about the—when I had reason to look at it, I gave the signal.

Q. You were the man that was in charge of the coupling operation?

A. Yes, sir.

Q. And you were therefore the man who was in control, so far as signals were concerned, weren't you?

A. Yes, sir.

Q. And you could have stopped that cut at any time that it came down there, couldn't you?

A. Yes, sir.

Q. By a swing-down signal?

A. Yes, sir.

Q. What is the fact—cars couple better with both knuckles open than they do with just one, don't they?

A. No, sir.

Q. Oh, they don't?

A. No, sir.

Q. Well, you can't couple them at all with both closed, can you?

A. No, sir.

[fol. 88] Q. And you say that with one open and the other closed, is just as effective a way as to have both of them open; is that right?

A. Yes, sir. Sufficient.

Q. I am asking you whether it coupled better and easier, or coupled easier, rather?

A. No, sir.

Q. With both knuckles open?

A. No, sir.

Q. Now, if I can use my fist here for a closed coupler——

Mr. Bernsteen: Don't get it caught.

Q. —the way these things operate, with the knuckle closed, is, that they come down there and couple automatically; is that right?

A. Yes, sir; by impact.

Q. And that will do it with just one knuckle, with one knuckle closed and the other knuckle open?

A. Yes, sir.

Q. It is impossible, is it not, to couple together with both knuckles closed?

A. Yes, sir.

Q. You just run up against the other?

A. That's all.

Q. From the time you took your position there at the north end of this "Pee-Mickey" car, you would have had the right to stop the cut, any time, beforehand?

A. Yes, sir.

Q. And could have opened the Baltimore & Ohio knuckle, yourself, couldn't you?

A. Yes, sir.

Q. The cutting-lever to that was on the other side?

A. On the west side.

Q. On the west side?

A. On the other side.

Q. Would be on the west side?

A. Yes, sir.

Q. That is, these cutting levers, if you take a freight car, this being a "Pee-Mickey" car on your side, the cutting-lever was, and then on the opposite end, the lever would be on the opposite side?

A. Yes.

[fol. 89] Q. Is that right?

A. Yes.

Q. There's only two cutting-levers on a car, and they are on the opposite corners?

A. Yes.

Q. Now, you say that after the swing-down signal, this B. & O. car came down against this other car, and the coupling didn't make?

A. After the steady signal.

Q. After the steady. I mean the "steady" signal. The coupling didn't make?

A. No.

Q. And as a result, this closed—the knuckle on the "Pee-Mickey" car closed?

A. Yes, sir.

Q. And I suppose this and the other car were jarred back some, weren't they?

A. Yes.

Q. Along the track? About how far from where they stood?

A. About two or three feet.

Q. So that this car, this not having made, was jarred back there two or three feet?

A. Yes.

Q. And how far was the Baltimore & Ohio car from that knuckle when those cars stopped?

A. Two or three feet.

Q. Two or three feet?

A. Yes.

Q. So that that knocked back two or three feet, and the B. & O. car stopped?

A. Yes.

Q. Now, what was the first thing you did there, Mr. Gilvary?

A. As they hit, I swung them down.

Q. That means you go like this (indicating)?

A. Swung them down.

Q. Cross-ways, like that (indicating)?

A. Cross-ways.

Q. Did that mean to stop?

A. To stop.

Q. Did he stop?

A. Yes, sir.

Q. And as he stopped, these other cars were banged back two or three feet?

A. Yes, sir.

[fol. 90] Q. Not more than that?

A. Not more.

Q. And what did you do then?

A. Blocked the car.

Q. Blocked this car? Did you block these cars? Did you put that block down there before the motion to the south had stopped, or when they stopped?

A. When they stopped.

Q. And what do you mean about a block of wood—something like a 2 x 4, or something?

A. Yes.

Q. Across one rail?

A. Yes, sir.

Q. Now, having got that car blocked, what did you do then?

A. I got hold of the cutting-lever.

Q. That is, on this model, that would be this?

A. Yes.

Q. And you say you had to take two hands to it, but you finally raised it, and it finally opened; is that right?

A. I took one hand and couldn't move it.

Q. I understand.

A. And I took the two.

Q. Took the two? But you got it open?

A. Got it open.

Q. Went open. And what do you say to this jury, in opening that thing, whether you could see anything broken or defective about that coupler?

A. Could not.

Q. All right. And therefore did not, I suppose? I assume. Is that right?

A. I said "could not."

Q. All right. Now, you have that open, and then what did you do?

A. Looked all right, looked to be in line, to me, and I signal the engineer to back up.

Q. Did you touch that coupler other than by using the cutting lever?

A. No, sir.

The Court: A suggestion, Mr. Kinder. You see that, but I don't think the jury sees it, at all. Point it to the jury instead of the witness.

[fol. 91] Mr. Kinder: All right. I'll tell you what we'll do. We will park it up that way.

The Court: Point the other way. They want to see the coupler.

Q. Now, Mr. Gilvary, the only thing you touched about that coupler was—after you had blocked the other cars—was, by the use of both hands, lift that pin and swing her up?

A. Yes, sir.

Q. And she swung open all right?

A. Yes.

Q. And then you did what?

A. Signaled the engineer to back up.

Q. And did you you again signal directly to the engineer?

A. Yes, sir.

Q. Wasn't that signal transmitted through the conductor or the brakeman?

A. No, sir.

Q. Head brakeman?

A. No, sir.

Q. How?

A. No, sir.

Q. You could see this engineer plainly?

A. Yes, sir.

Q. Leaning out of the cab, was he?

A. Yes, sir.

Q. And he came back?

A. Yes, sir.

Q. Properly?

A. Yes, sir.

Q. And they hit again, did they?

A. Yes, sir.

Q. And didn't "make"?

A. No, sir.

Q. Is that right? Then you blocked them again?

A. Just as they hit, I swung them down.

Q. Oh, so that you have given, now, a "steady" signal, a "stop" signal, a "come-ahead" signal?

A. Back up.

Q. Or a "back-up" signal, father, and a "swing-down" signal?

A. Yes, sir.

Q. That is four of them, to date?

A. Yes, sir.

[fol. 92] Q. All of them you say you gave to the engineer of this train?

A. Absolutely.

Q. And you had seven cars between you and the engine?

A. Yes, sir.

Q. All right. And this coupling occurred on a curve?

A. Just on a slight curve.
Q. Now, you swung him down?
A. Yes, sir.
Q. And then what did you do?
A. Blocked the cars.
Q. And then what did you do?
A. Tried to open that knuckle by the cutting-lever.
Q. And didn't get it open?
A. No, sir.
Q. All right. Then what did you do?
A. Decided to work the B. & O. car. Swung the engineer down.
Q. All right. Now, that is five. There's five signals.
A. Yes, sir.
Q. Now, you swung him down by going like that (indicating)?
A. Yes, sir.
Q. That meant for him to do what?
A. Stand there.
Q. Stop, and stay there?
A. Stay there.
Q. All right.
A. Till he received a signal from me again.
Q. From you?
A. Me.
Q. Yes. That is to say, that engineer was, after that fifth signal which you gave to him, directly——
A. Yes, sir.
Q. —was not and could not move that train until he had got a signal from you?
A. No, sir.
Q. You mean "yes, sir"? That was the situation, wasn't it?
A. I mean, he can't move the train.
Q. Yes. Now, you got swung down, and you go in to the Baltimore & Ohio car?
A. No sir.
[fol. 93] Q. Oh, what did you do then?
A. I gave that a couple of pulls, and couldn't get it open.
Q. Oh, I see. Then, after you couldn't get that open, you went over to the Baltimore & Ohio?
A. I decided to line up the Baltimore & Ohio.

Q. Now, we will change over to the Baltimore & Ohio, here, and we will have to go the other way. That knuckle was closed, wasn't it?

A. Yes, sir.

Q. How far was that Baltimore & Ohio knuckle from the "Pee Mickey" knuckle?

A. About a foot and a half.

Q. About a foot and a half? This fifth signal, "swing-down" signal——

A. Yes, sir.

Q. Do you know whether or not the engineer saw that?

A. Yes, sir.

Q. How do you know that?

A. He answered me.

Q. And how did he answer you?

A. By his hand out the window.

Q. The engineer, after you gave that fifth signal, which was a swing-down signal, and meant that he was to stop and stay there——

A. Yes, sir.

Q. —he answered that, by waving the hand?

A. He absolutely did.

Q. Yes. All right. And then, and only then, was it that you went in between the cars?

A. Yes, sir.

Q. And you put your hand on this knuckle, did you?

A. On the draw-bar.

Q. On the draw-bar?

A. Yes, sir.

Q. And then what happened?

A. I just went to pull that over.

Q. Yes?

A. And as I got all the weight on me, the cars came back on me. He backed up.

[fol. 94] Q. That is, the Baltimore & Ohio car came back?

A. Yes, sir.

Q. The other cars didn't move, did they?

A. No, sir.

Q. They had been blocked, hadn't they?

A. They had been blocked.

Q. So that the cause of your accident was, when you had your hand in there, the engineer, disregarding the signal that you had given him, and disregarding his acceptance signal, you say moved that train back?

A. Yes, sir.

Q. And caught your arm?

A. Yes, sir.

Q. Well, what was this head brakeman up at the engine for?

A. To give signals, if he was needed.

Q. Oh. Well, he was located on the east side of the track, the same side you were?

A. Yes, sir.

Q. And how far from the engine was he?

A. Oh, I couldn't say that. Right about the the tender, I should judge.

Q. I mean, how far out from the track was he?

A. Oh, about four or five feet.

Q. And the head brakeman's job is to stay by the engine, so that he can transmit signals to the engineer, isn't it?

A. If necessary.

Q. When the cars came back together, the first time, where was the conductor?

A. At the switch.

Q. And how far? On the eastside, the same side you were?

A. Yes, sir.

Q. How far away from the track was he?

A. At the switch. The end of the tie, the switch tie. I don't know how——

Q. Well, is it fair to say that he was three or four feet from the rail?

A. No.

[fol. 95] Q. How?

A. About two or three feet.

Q. And where was he the last time you saw him before your accident, before the coupling?

A. Right there.

Q. Right there?

A. Same place.

Q. Looking at you?

A. No, sir.

Q. What was he doing?

A. Taking numbers. Had his cards out, doing some writing.

Q. Well, he already had the numbers of these cars, didn't he?

A. I couldn't tell you that.

Q. Well, he got these cars on the west track, hadn't he?

A. Yes.

Q. And you said a little while ago that he went down there and outlined the work to be done?

A. Yes, sir.

Q. Well, didn't he get the numbers then?

A. I don't know.

Q. Well, what would he be doing down there, if he didn't get the numbers?

A. To get the cars that come out. He had those numbers.

Q. You had in your view, as the train came down there slowly, this Baltimore & Ohio coupler?

A. Yes, sir.

Q. Before the first attempt, and at the second attempt, didn't you?

A. Yes, sir.

Q. It was a large coupler, about the same size of the "Pee-Mickey" coupler?

A. About the same.

Q. What do you say to the jury, to the extent that you observed it, whether you could see anything broken or defective about it?

A. No, sir. You have got to examine, to find that out.

Q. You say you have to examine?

A. Yes.

[fol. 96] Q. And that means that you have got to—somebody has got to measure it and test the play, measure the play, don't you?

A. Correct.

Q. And that is the way to find out whether the coupler is defective, isn't it?

A. Yes.

Q. Yes. But, to the extent that that object, as it came down towards you slowly with the coupler closed—to the extent that you observed it, you couldn't see anything wrong with the Baltimore & Ohio coupler, could you?

A. No, sir.

Q. I want to hand you a photograph which has been marked Defendant's Exhibit 5, and ask you to state whether that is a fair picture of the west track and the

switch off the east track, as it was at the time you were hurt?

A. No, sir.

Q. And what is wrong with it?

A. It has a car on the frog.

Q. Yes?

A. And there is a pile of material here.

Q. Now, you say—well, I am not asking you about the—withdraw that.

A. You asked me—

Q. I see. Well, then, you say that this photograph is not a fair representation of the situation as it was at the time of the accident, for two reasons: first, that there is this gondola car on this frog—is that it?

A. Yes, sir.

Q. And then, right back, or right past the gondola car, under, right at the bottom of the line, running down from the word "east," there is a pile of lumber?

A. No, sir.

Q. Well, let me—

A. Right here.

Q. Oh. Then you say that pile of lumber over on the left of the track——

A. I don't know whether that is lumber or what it is, but it looks like lumber to me.

[fol. 97] Q. Well, a pile of material?

A. Yes.

Q. Wasn't there at that time?

A. No, sir.

Q. Nothing like that?

A. No, sir.

Q. That was all free?

A. Free and——

Q. Wasn't any material along there at all?

A. Oh, yes. This was all here (indicating).

Q. Well, now, which was all here?

A. Slabs, here.

Q. That is these board-looking things here?

A. Yes.

Q. That was there?

A. Yes, sir.

Q. But that pile of lumber, or pile of material, there, with that kind of an X on it, wasn't there?

A. Not there. To my knowledge, not there.

Q. To your knowledge, not? You were there. You would know?

A. I said, to my knowledge it wasn't there. Not there.

Q. Aren't you willing to say it was not there?

A. I said it was not there—to my knowledge it was not there.

Q. Now, I want to mark this pile of material.

Mr. Kinder: Max, look here.

Mr. Bernsteen: Let me look at it too, if you will.

Mr. Kinder: Oh, sure.

Mr. Bernsteen: All right, all right.

Mr. Kinder: There is some lumber pile, apparently, that makes a kind of an X, and I want to identify it.

Mr. Bernsteen: That is right.

The Court: Circle around in ink what he says wasn't there.

Mr. Kinder: All right.

The Court: Put it in a circle, what he claims wasn't there.

Mr. Kinder: Now, let us get this accurate. If I draw a line right around that——

[fol. 98] Mr. Bernsteen: Don't spoil the picture.

Mr. Kinder: Around there—is that correct?

The Witness: All the way around. Right around this here.

Q. This was in here, wasn't it (indicating)?

A. This is slab that these men was working.

Q. All right. If I draw a line——

A. Around this, here, right around there.

Q. You say that (indicating) wasn't there?

A. Yes.

Q. All right. We are agreed on that?

A. Can I see that after you draw it?

The Court: Let him draw it. Let the witness draw it.

Mr. Bernsteen: That is the better way.

The Witness: You hold it.

Mr. Kinder: Yes, sir.

(Witness indicates on the photograph as requested.)

Q. You say these things were here (indicating)?

A. Yes.

Q. Do you want to put it up there and run it around like that?

A. This was on the ground, here (indicating).

Q. Part of the lumber pile, wasn't it?

A. Yes, this is a part of the lumber pile, right here. That is the pile of lumber—I don't say it is lumber, but whatever it is—wasn't there at that time (indicating).

Mr. Kinder: The witness has marked with ink the limits of a pile of lumber, or material, whatever it was, which was not there at the time this accident occurred:

[fol. 99] The Witness: What do you mean by "limits"? Come here. I have to get this straight, too. Now, what do you mean by "limits"? I can't measure this thing out and get it exact for "limits."

Mr. Bernsteen: Oh, that is all right. An "X" would have been all right.

Mr. Kinder; What is that?

Mr. Bernsteen: It is all right. An "X" would be all right.

Mr. Kinder: Well the word "limit" is all right, isn't it?

Mr. Bernsteen: Sure.

Mr. Kinder: Well, that is what I thought.

Mr. Bernsteen: You can't tell from a picture or photograph exactly how it is.

Mr. Kinder: I see.

The Court: There was a standing railroad car shown, Mr. Kinder, in the picture, which was not there?

Mr. Kinder: And the standing railroad car.

Q. Otherwise, the photograph is a fair representation?

A. Except this car. That is, the standing car.

Q. I understand that—except that car and this material?

A. You said a standing car. The standing car.

Q. Now, what do you say, Mr. Gilvary, as to whether those two cars, back on the east track, were in the position of the "Pee-Mickey" car and the B. & O. car, when the first attempt at coupling was made?

A. This is now the B. & O. car?

Q. Yes.

A. Yes. This car (indicating) was out of the picture.

Q. I understand that. Now, that car that is out of the picture was on the west track?

A. Yes, sir.

[fol. 100] Q. Or on the frog? These other two cars are in substantially the same position they were when the Baltimore & Ohio car came up against the "Pee-Mickey" car?

A. This is the Baltimore.

Q. Oh, this is the Baltimore (indicating)?

A. That is what you say. You just said that.

Q. No, I said, are these two cars, without reference to what they are, substantially in the position that the cars were in when the first attempt to couple was made?

A. No, because this was a hopper.

Q. Well, assuming whatever kind of car it was, are those two freight cars on that east track about where the two, B. & O. and the "Pee-Mickey" car was, when the first attempted coupling was made?

A. You want to make these two hoppers—yes.

Q. Yes.

A. But not a gondola and a hopper—two hoppers.

Q. Well, hold on here a minute. You say the Baltimore & Ohio car was a hopper car?

A. According to your question that you have asked me.

Q. Oh, no, no, no; not according to me, now—according to your recollection of it.

A. I would like to—I can't answer, the way you ask me.

Q. Well, you said the "Pee-Mickey" car, the one that stood there, was a what—a hopper?

A. A hopper.

Q. And the B. & O. was what?

A. A gondola.

Q. Yes. Well, now, that picture of the cars on the east track shows a gondola and a hopper, don't it?

A. Correct.

Q. So that, so far as those cars are concerned, they were of the same type and in the same approximate location as the two cars were which you started, tried to couple; is that right?

[fol. 101] A. Is this the southerly car of our train? That represents the southerly——

Q. Yes.

A. Correct. All right.

Q. All right. That straightens that out.

Redirect examination of John L. Gilvary.

By Mr. Bernsteen:

Q. How many attempts at coupling were made?
A. Two.
Q. Now, you said, before, that you had made couplings at that point before. Is that correct?
A. Correct.
Q. But that, you meant automatically by impact?
A. Yes, sir.
Q. Without going between the cars?
A. Yes, sir.

Recross-examination of John L. Gilvary.

By Mr. Kinder:

Q. Without adjusting the draw-bars?
A. Yes, sir.

(Witness excused.)

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Rudolph Heym, produced, sworn, and examined as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Bernsteen:

Q. What is your name, please?
A. Doctor Rudolph Heym.
Q. And you are a physician and surgeon?
A. Physician and surgeon; yes sir.
Q. And how long have you been in this town, Doctor?
A. Since 1913.
[fol. 102] Q. Are you connected with any hospital in town, Doctor?
A. Staff of Huron Road hospital.

Mr. Kinder: We will concede the Doctor's qualifications?

A. Grace hospital.

Mr. Bernsteen: All right.

Q. Doctor, you remember, at my request, some time ago, you made some X ray pictures of the arm of Mr. Gilvary?

A. I did.

Q. Did you treat Mr. Gilvary, also?

A. I treated him; yes, sir.

Q. And over what period of time did you treat him?

A. Treated him from September, 1929, until September of this year.

Q. When you first saw him, Doctor, what was the condition of his arm, please?

A. His fore-arm was in a leather support that was reinforced with steel. The middle of the arm, slightly below the middle, was bowed forward, the angle of the bones showing very, very prominently. The fore arm, the hand, and the fingers were cyanotic. I mean by that, blue, and cold, and clammy. Had no use of his fingers or his wrist. Had several scars, one on the front part of his fore arm. One was five inches long, circular, and one, two inches long. They were operation scars.

Q. You mean, scars that must have come from an operation?

A. Operation. And a scar across the back of his wrist, which was also an operation scar. Little finger was flexed inward.

Q. Doctor, you took some pictures of his arm?

A. Yes, sir.

[fol. 103] Q. I hand you Plaintiff's Exhibit.

Mr. Bernsteen: Mark this, I guess, 1.

(X-ray plate marked for identification Plaintiff's Exhibit 1.)

Q. One. And ask you what that is, Doctor.

Mr. Bernsteen: Identify that as 1, and this one as 2.

(Second X-ray plate marked for identification Plaintiff's Exhibit 2.)

(The ensuing questions were put to the witness as he exhibited the X-ray plates to the jury at a window of the court-room, by permission of the Court.)

Q. I will hand you Plaintiff's Exhibit 1 and I will ask you to state what that shows.

A. This is an X-ray of the hand and wrist and fore-arm of Mr. Gilvary. Left fore-arm.

Q. And when was that taken?

A. That was taken in 1929, September.

Q. What does it show, Doctor?

A. Shows a fracture of the radius and ulna, slightly below the center. Poor position. This picture here was taken in front, and this thumb, towards me, in this position, laying this way (indicating). These bones are angulated forward. This is the front of the fore-arm. This is taken of the left arm, flat down on the plate. Shows angulating to the right, or towards the radius.

Q. Where is the thumb, Doctor?

A. Fracture of the thumb, here. That was partially healed.

Q. Doctor, is the little finger bent?

A. That is the little finger, and that is bent. Entire hand is "clawed."

[fol. 104] Q. I hand you Plaintiff's Exhibit 2, and ask you what that is.

A. Those are different views of Mr. Gilvary. Shows practically the same thing, except it doesn't show the hand. It shows up towards the elbow further.

Q. The accident was in April. This was taken about five or six months after the accident?

A. Yes, sir. This was in September.

Mr. Bernsteen: You make take the chair, Doctor.

(Witness resumes the witness-chair.)

Q. Doctor, when is the last time you saw Mr. Gilvary?

A. It was in September of this year.

Q. About two months ago?

A. About that.

Q. And what is the condition of his hand and arm, at the present time?

A. The last time I saw him, there was no improvement. If anything, more adhesions, and the arm was stiffer than when I first saw him.

Q. What do you mean by "more adhesions," Doctor?

A. Well, everything seemed to be tighter, and the fingers seemed to be more fixed than when I first saw him.

Q. How was the hand as to being cold, or——

A. The hand was still cold and clammy.

Q. What caused those fingers to be fixed the way they are?

A. Loss of control. He has no movement, and they are in the position that they stay in.

Q. Are they of any use to him, at all?

A. No use.

Q. The wrist and arm—are they deformed, or are they straight?

A. Deformed very much, with an angulation forward.

Q. How about the blood supply and nerve supply, Doctor?

A. The blood supply and nerve supply is impaired, as shown by the cyanotic condition of the cold and clammy ap- [fol. 105] pearance of the arm, wrist, and lower fore-arm.

Q. You know it is cut, destroyed, and impaired by reason of the hand and wrist, do you?

A. Yes, sir.

Q. Will he ever be able to work with that hand and arm?

A. No, sir.

Q. That is permanent, is it, Doctor?

A. Yes, sir.

Mr. Bernsteen: That is all, Doctor. May I show the jury——

Mr. Kinder: No cross-examination.

Mr. Bernsteen: That is all, Doctor.

(Witness excused.)

Mr. Bernsteen: May I show the arm and the wrist to the jury now, if your Honor please?

The Court: All through with the Doctor?

Mr. Bernsteen: Yes, I am all through with the Doctor. You may go.

Mr. Kinder: I would like to object to that, if your Honor please.

(Plaintiff exhibits his left arm and wrist and hand to the jury.)

Mr. Kinder: I would like to object to that, if your Honor please. Your Honor, I should like to object.

The Court: Register your objection, and let him exhibit it.

Mr. Kinder: Exception.

(Plaintiff exhibits his left arm and wrist and hand to the jury.)

Mr. Bernsteen: I offer these exhibits, if your Honor please, 1 and 2.

(X-ray plates, offered in evidence on behalf of the plaintiff and identified as Plaintiff's Exhibits 1 and 2, are hereto attached and made a part hereof.)

[fol. 106] Mr. Bernsteen: Plaintiff rests, your Honor please.

Plaintiff rests.

(Jury excused until 1:15 P. M.)

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DEFENDANT'S MOTION FOR DIRECTED VERDICT

Comes now the defendant, at the close of the plaintiff's case, and moves the Court to direct the jury to return a verdict for the defendant, or to arrest the evidence from the jury and to enter judgment for the defendant.

Motion overruled. Defendant excepts.

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Thereupon the defendant, to maintain the issues on its part to be maintained, offered the following evidence:

DEFENDANT'S EVIDENCE

HERBERT MELVIN, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Your name is Herbert Melvin—M-e-l-v-i-n—is it not?
A. Yes, sir.
Q. Where do you live, Mr. Melvin?
A. I live in Canton, but I stay at 2111 West 83rd Street.
Q. And are you employed now by the Cuyahoga Valley railroad? A. I am.
Q. And how long have you been employed by the railroad, Mr. Melvin?

A. About two years.

Q. And prior to that time, you had some railroad experience, did you not?

A. Yes, sir.

Q. With the Pennsylvania railroad?

A. Yes, sir.

Q. In what capacity did you work for the Pennsylvania?

A. I started with the Pennsylvania as braking, and later [fol. 107] promoted to conductor, and then to yardmaster.

Q. Brakeman, conductor, and yardmaster? And you were the conductor of the crew of which Mr. Gilvary was a member, the night he was hurt, were you not?

A. I was.

Q. And as I understand it, this engine and your crew had made a move or two on the west track, and immediately before the accident had pulled out to clear the switch leading onto the east track, had you not?

A. We did.

Q. And how many cars did your engine have hold of, do you remember?

A. I believe about six.

Q. Six cars? And it was intended to back those, that cut of cars, down on the east track, in a southerly direction, wasn't it?

A. To back that way; yes, sir.

Q. And were you the one that threw the switch so that the train could back in there?

A. I was.

Q. I refer to the switch that leads into the east track. Now, there were some cars standing on the east track, were there not?

A. Yes, sir.

Q. And what was intended by this movement as you went, the cars went back there? To couple onto those cars?

A. To couple onto those cars.

Q. Do you recall what kind of a car was the first car in—that is, on the cut that you were moving in—the first cars that went in?

A. You mean the owner of the car?

Q. Yes.

A. I believe it belonged to the B. & O. railroad.

Q. B. & O. gondola?

A. Yes.

Q. I think that is agreed, and I think it is agreed that this first car in, into which the coupling was to be at-[fol. 108] tempted, was what you railroaders call a "Pee-Mickey" car; is that right?

A. I can't just recall what that car was.

Q. Now, where were you as these cars moved past over the switch which you had thrown?

A. I stood close by the switch, where I had thrown it.

Q. And as that B. & O. car moved over the switch points, then there would be six cars, the tank, and the engine, to the north of it, wouldn't there?

A. Yes.

Q. You had a head brakeman in your crew, did you not?

A. I did.

Q. His name was Skuce, I think. And where was he?

A. He was back on the—there is another curve, leading in onto that, where you move towards the west track. He was back that way.

Q. You say—you mean the other track—you mean the curve of the track which leads in off the running track?

A. The No. 5.

Q. Yes. The locomotive was up about that switch, was it, or beyond?

A. Well, it would be in there pretty close; yes.

Q. He was up here? Was he in your view? Could you see him?

A. Yes.

Q. Now, the rear brakeman was Mr. Gilvary, wasn't it?

A. Yes.

Q. And as the cars moved down here, did you see Gilvary? I mean, before they attempted to couple?

A. Yes, sir.

Q. And he was standing east of the track—east of the east track, on the same side you were, was he?

A. On the same side.

[fol. 109] Q. And what was his duty down there? What was his job?

A. Well, his job was to tie—to couple onto those cars.

Q. Couple onto the cars? After the train had pulled up, so that the B. & O. car cleared this switch, do you recall who gave the signal for the backward movement?

A. Well, I just——

Q. You will have to speak up. These gentlemen clear at the end of the jury want to hear you.

A. It would be my duty, after throwing the switch, to give the signal, so I would say I gave the signal.

Q. I see. Now, the engineer, as long as the engine was headed in the northerly direction, would be on the same side that you were, wouldn't he?

A. Engineer; yes.

Q. In response to that signal, did the train move back?

A. Yes, sir.

Q. Now, you were standing about that switch. State where, with respect to this curve on the east track, the "Pee-Mickey" car was standing.

A. About the distance from that switch, you mean?

Q. No, the curve. There is a curve in the east track, isn't there?

A. Oh, yes. Well, it was standing right on that curve.

Q. Right on the curve? And the Baltimore & Ohio car and the other cars passed you, did they not, as they went in?

A. Well, not all of them.

Q. Well, not of all of them, but the Baltimore & Ohio did?

A. Yes, the Baltimore & Ohio did.

Q. How far is it, about, from the point of curve back to the switch, there? Have you a general idea, Mr. Melvin?

A. Well, I would say about eighty or ninety feet, something about like that.

[fol. 110] Q. Around two car-lengths?

A. Something like that.

Q. Figuring a car to be forty feet. Now, I wish you would tell us, after you gave the signal, did you have Gilvary in view? I mean, could you see him?

A. Yes, sir.

Q. Now, I wish you would tell the jury in your own way just what happened down there that you saw on that night.

A. In regards to the accident?

Q. Yes.

A. Or the switching?

Q. How the cars—now, we have got the cars coming down there, and you intended to couple onto them. Now, what happened that you are——

A. Well, when he got back close to this car there, or just about the time the coupling was to be made, why, Mr. Gilvary swung down and went between the cars, and then, just

as he gave the signal, then there was a kind of an impact. I don't know whether it was the train moved a little, or whether it was just the cars came back from the slack that were in the cars. Mr. Gilvary came running out, holding his hand.

Q. Now, when the cars came down there, did the B. & O. car come up against the "Pee-Mickey" car?

A. Did it hit the "Pee-Mickey" car?

Q. Yes.

A. Yes. The knuckles were, after we——

Q. Yes. Now, when was it, with reference to the time that the B. & O. car came down and the attempted coupling was made, that Mr. Gilvary swung down? Was it just at the time, or afterwards?

A. Well, just as the cars came together.

Q. Yes, he swung down? What kind of a signal was that?

A. Well, that would be a signal like that, crossways (indicating).

[fol. 111] Q. Across, horizontal with the ground?

A. Yes.

Q. Now, when he swung down, what if anything did you do?

A. I swang down. I repeated the signal to the engineer.

Q. You repeated the signal? And did the cars stop, pursuant to that?

A. Yes, sir.

Q. Now, you say that Mr. Gilvary, as soon as he swung, or as he swung down, he went in between the cars, you say?

A. Just, that is, just like when he swings, just after he had swang down, he went in between the cars, yes; that is, after the cars, you might say, had stopped, or——

Q. Did he disappear from your view when he went in?

A. Yes, sir.

Q. I see. Now, did he give any other signal there, from the time he swung down until he came out, holding his arm?

A. I didn't see it.

Q. What did you do when you saw him come out holding his arm?

A. I went back towards him, and he said his arm was hurt, and I said some joking thing. I thought he was kind of—he kind of had a smile on his face, and I thought he was joking, and as soon as I saw that he wasn't, then I went right over, and I believe I brought him to a place, sit him

down, and called went and got a man to take him to the dispensary.

Q. Was there some bandaging of his arm right there, to stop the flow of blood?

A. Yes. We bandaged up his arm and stopped the flow of blood.

Q. And how was he gotten to the dispensary?

A. Took him over in the boss of the blooming mill's automobile.

[fol. 112] Q. You mean, the boss of the blooming mills this is the blooming mill, right east of the east track, isn't it?

A. Yes.

Q. And the boss there had a car, and you put Mr. Gilvary in it and took him over to the dispensary, did you?

A. Yes, sir,

Q. Which way is the dispensary from the blooming mill?

A. Well, it would be east, I guess you would call it.

Q. Is it down towards

A. The blast furnace.

Q. Down towards the blast furnace? Well, how far is it? Is it quite a ways or not?

A. Well, I would say it isn't. It might be a little better than a quarter of a mile, something like that.

Q. Anyways, you got him over there to have first aid to given to him?

A. Yes, sir.

Q. Now, Mr. Melvin, after that first attempted coupling, and Mr. Gilvary swinging down, which you say the engineer responded by stopping his train, and Mr. Gilvary going in, and then stepping out, holding his arm, did he give any other signals than just that one swing down, which you saw?

A. That is all I saw.

Q. Did you see him give any go-ahead signal after that?

A. No, sir.

Q. Did you see him give a second stop signal after that?

A. No, sir.

Q. Now, after the accident, you went with him to the dispensary, did you?

A. Yes, sir.

Q. Did you leave your engine crew there? The engine and the cars were left right there at the time, while you were getting him to the dispensary?

A. Yes, sir.

[fol. 113] Q. And you went, took him to the dispensary, and did you come back to where the accident had occurred afterwards?

A. Yes, sir.

Q. About what time? Do you remember about what time of day it was, approximately, that the accident occurred?

A. I can't just recall the time. I believe it was——

Q. What time did you go to work there on your trick?

A. Four o'clock.

Q. Four o'clock? Would you say it was around 5:30?

A. 5:30 or six o'clock, somewhere around there.

Q. Somewhere around in there? Then you came back there, as I understand it, you came back to where the accident occurred?

A. Yes.

Q. Were the cars still standing there where they were when the accident occurred?

A. Yes, sir.

Q. The engine? Now, did you go up to where this B. & O. and "Pee-Mickey" car were, after the accident?

A. I did.

Q. I wish you would state to the jury, were the cars together?

A. The cars were together, with the knuckles—that is what pulls the cars—they were together, with the knuckles shut.

Q. With the knuckles shut?

A. They were not coupled.

Q. But not coupled?

A. Not coupled.

Q. Now, was this model (Defendant's Exhibit A)—as I understand it—and this is for the B. & O. car—and using my fist here, for the other coupler, just for the sake of example, do I understand that this knuckle of the B. & O. car and the knuckle of the "Pee-Mickey" car were closed?

A. They were.

[fol. 114] Q. And that the B. & O. knuckle was up against the "Pee-Mickey" car, so (illustrating)?

A. Yes, sir.

Q. But they had not engaged?

A. No, sir.

Q. And that these two cars—so that as I understand it, when you got back, these two cars were together, and the knuckles were closed, and the knuckle to the B. & O. car was up against the knuckle of the "Pee-Mickey" car, like that (illustrating), without the knuckles having been engaged; is that correct?

A. Yes, sir.

Q. Was the engine, attached to the six cars, there, still standing there?

A. Yes, sir.

Q. Your engineer's name was Cornell, wasn't it?

A. Yes, sir.

Q. Now, when you got back there, was there anybody else outside of your crew there?

A. Mr. Keppers, and the car inspector.

Q. Mr. Keppers and the car inspector? Who was Mr. Keppers?

A. Yardmaster.

Q. Now, your head brakeman, Mr. Skuce; had he gone with you to the dispensary with Mr. Gilvary?

A. Yes, sir.

Q. The engineer and fireman stayed with their engine, did they?

A. Yes.

Q. Now, when you got there, Mr. Keppers, the yardmaster, and the car inspector were there, were they?

A. They were.

Q. Now, did the car inspector make any inspection of the knuckles of those cars there in your presence?

A. Yes, sir.

Q. And were the two cars pulled apart?

A. Yes, sir. We pulled the cars apart for inspection.

Q. And were you there? By the way, do you remember what the car inspector's name was?

[fol. 115] A. I can't remember. I know the man, but I can't remember his name.

Q. Was it "Mike" Bawolak? Do you remember, or don't you recall?

A. Well, they called him "Mike," but I can't tell you his last name.

Q. Now, how far were the cars pulled apart, there, Mr. Melvin?

A. I would say six or eight feet.

Q. And who signaled that movement?

A. I did.

Q. Now, after the cars were pulled apart, did Mr. Keppers and the car inspector make any examination of those couplers in your presence?

A. Yes, sir. They looked them over.

Q. And did you personally look them over, yourself?

A. Well, I did, in regards to the—you might say—operation—the operation of the knuckles. That is, opened the knuckles.

Q. Did you have occasion to use the cutting-lever on the cars, to operate them?

A. I did.

Q. Tell the jury what the operation of the cutting-levers was? Did it work?

A. Yes, sir; it worked.

Q. Did you try the cutting-lever on the B. & O. car?

A. I can't recall. Yes, I opened both knuckles. I opened both knuckles.

Q. Did you have any trouble in the using of the cutting-levers to open those knuckles? Did they function all right?

A. They did.

Q. Then, did Mr. Keppers make an examination of the couplers, while you were there?

A. Well, they were both there together, looking around. I couldn't say as to just what——

Q. When you pulled these cars apart, I assume that you pulled the B. & O. car away from the "Pee-Mickey" car. That is what you mean, is it?

A. Yes, sir.

[fol. 116] Q. About eight feet? Now, after the examination was made, there, by the car inspector and Mr. Keppers, was any attempt made to couple the cars?

A. I coupled the cars.

Q. All right. Now, what did you do when you say, as a railroad man, that you coupled the cars? Did you signal the train to move up?

A. I, after I had opened the knuckles and adjusted the draw-bars, then I signaled the engineer to back up.

Q. And did the B. & O. car come in contact with the "Pee-Mickey" car?

A. Yes, sir.

Q. And did the couplers operate?

A. They did.

Q. By impact?

A. Yes, sir.

Q. And the knuckles engaged, did they?

A. Yes, sir.

Q. Now, you said to the jury that you opened the knuckles. You mean that you opened the knuckles on both couplers?

A. I think that I did. I wouldn't be positive, but I am sure that I did, because it is on a curve, and you pretty near have to, on a curve.

Q. Now, another thing I want to ask you—you say you opened the knuckles on both cars. Did you adjust—you say you adjusted the draw-bar. What did you mean by that?

A. Well, this draw-bar moves backwards and forwards, the play.

Q. In the draw-bar?

A. Yes, where it goes into it like that. There has got to be.

Q. There is some play in every draw-bar, isn't there?

A. Yes, sir.

Q. And when you say you adjusted the draw-bar, you mean you pulled it one way or another, and you say you did that, because of what?

A. On account of it being on a curve. Draw-bar was out of line.

[fol. 117] Q. Now, having pulled the cars away, and then having opened one or both knuckles and adjusted the couplers, you signaled the train to come back, did you?

A. Yes, sir.

Q. And it came back, and the couplers engaged, and it made automatically, did it?

A. Yes, sir.

Q. From your observation, and to the extent of your observation there that night, after the accident, could you see any defects in that coupler, or either one of them?

A. I did not.

Q. Was there anything broken about it that you saw?

A. Nothing that I saw that was broken.

Q. The pin worked, did it, on both of them?

A. Yes, sir.

Q. Knuckle, itself, was not broken, was it?

A. No, sir.

Q. Now, this, you say you adjusted the draw-bar. How much play is there in an ordinary draw-bar, about? I mean, assuming that the coupler is in good condition.

A. I believe it is about, say at least four inches.

Q. Four inches? Now, when you adjusted this draw-bar, or these draw-bars, if you adjusted both of them, what do you say—was there any excessive play of the draw-bars there which you saw?

A. None that I saw.

Q. It isn't possible to couple two cars together when the knuckles are both closed, is it?

A. No, sir.

Q. I want to hand you a photograph, Defendant's Exhibit 5, and ask you to state whether or not that represents the general conditions existing there at the time this accident occurred?

A. Yes, sir.

Q. There is a freight car, here. What is that—a gondola?

A. That is a gondola.

[fol. 118] Q. That is on that switch-point. Of course, that car was not there, was it?

A. Well, they do shove them clear up, just so that that crane can get to them. It may have been there. There may have been cars standing right where that car is.

Q. Well, but this is the west track that car is standing on, isn't it?

A. Yes, sir.

Q. Well, of course, you couldn't have put in the B. & O.——

Mr. Bernsteen: Your Honor please, I think the witness should answer the question.

The Court: Yes. Don't suggest the answer.

Mr. Kinder: Well, I don't mean to do that.

Q. On this east track that leads off of the west track, there are a couple of cars standing down there, a gondola and a hopper car. Are those cars standing in substantially the same place that the two cars were when the coupling was attempted?

Mr. Bernsteen: Now, your Honor please, he hasn't answered the other question that Mr. Kinder asked him.

Mr. Kinder: You objected to it.

Mr. Bernsteen: Whether the car was there or not.

Mr. Kinder: You objected to it.

Mr. Bernsteen: How?

Mr. Kinder: You objected to it.

Mr. Bernsteen: No. I haven't got the answer. You talk about something else.

Mr. Kinder: Well, let us go back to it.

The Court: He is asking about two other cars.

Q. On the east track, down here, there are two cars, a gondola and a—what do you call that?—a hopper car?

A. Hopper car.

[fol. 119] Q. Are those two cars on the east track standing substantially the same place where the attempted coupling was made by Mr. Gilvary?

A. Yes, sir.

Q. Now, I notice some piles of material along here. I will ask you to state whether or not those were there at the time?

A. They were there.

Q. Now, I want to get back to this hopper car that Mr. Bernsteen speaks about.

The Court: Gondola.

Mr. Kinder: Yes, gondola.

Q. Was that car on that track in that position at the time of this accident?

A. Couldn't have been.

Q. That is, what—is it fair to state that what you mean is, that that car might have been on the west track, but not in that position?

A. Shoved on the east track. Couldn't be there.

Q. Why not?

A. Because I couldn't get in on the east track with that car standing on it.

Q. In other words, that car is fouling the switchpoint?

A. Yes, sir.

Q. And you couldn't shove cars in on that switch with cars in that position?

A. No, sir.

Q. Now, this metal thing that is along the way, here—is that where the crane operates, or what is that?

A. The crane operates on top of that. That is what they call the crane runway.

Q. Now, what are these piles at the left of the picture? What are those, Mr. Melvin?

A. We call them—in that picture, I couldn't tell whether it was the stripping or the plate. Well, the plate is either strip—some of them they call "strip," some of them they call "plate iron."

[fol. 120] Q. This metal, is it?

A. Metal, or——

Q. It looks like boards, to me, but you say that is strip metal?

A. Yes, sir.

Q. Now, down beyond that, that material that has got the ink line around it—what is that?

A. That is lumber we used for blocking.

Q. Blocking what?

A. Lay them on the bottom of the cars when they put that steel in the cars, so that the man can get the chains under those.

Q. That is, they are pieces of lumber that, when they load steel in the cars, they spread the steel by putting these blocks between the steel; is that it?

A. They lay the steel and lay the blocks right on the bottom of the car, and pile the steel on top of them, so they can get chains under them, to lift them off again.

Q. Was that pile of lumber there at the time Mr. Gilvary got hurt?

A. It was there.

Mr. Kinder: That is all.

The Court: You may reserve your cross examination.

Thereupon the further trial of said cause was adjourned until 9:15 o'clock A. M., Thursday, November 12, 1931; at which time Court met, the jury being present, and proceeded further with the trial of said cause as follows:

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Cross-examination of Herbert Melvin.

By Mr. Bernsteen:

Q. Mr. Melvin, you were the conductor. Is that correct?
A. Yes.

Q. And just before the movement was made upon the east slab track, you were at the switch?

A. Yes, sir.

[fol. 121] Q. And the purpose of the movement was to back back on the east slab track and couple onto the standing hopper car?

A. Yes, sir.

Q. What we call the "Pee-Mickey" car?

A. Yes, sir.

Q. And you threw the switch?

A. Yes, sir.

Q. And you stood at the switch, I suppose, when you threw it?

A. I think I did; yes.

Q. And then you gave a signal to the engineer?

A. To the head brakeman.

Q. You gave the signal to the engineer?

A. I couldn't see the engineer.

Q. Didn't you say the other day that you gave the signal to the engineer?

A. I gave the signal. That would mean it would be passed to the head brakeman.

Q. Did you say the other day you gave the signal to the engineer? Did you or didn't you say that?

A. I can't recall that I did, but I——

Q. And didn't you say at the prior trial, at least once and probably twice, that you gave the signal to the engineer?

Mr. Kinder: I object to that. Let us have the previous record.

Mr. Bernsteen: Oh, I can ask that.

Mr. Kinder: No, the witness is entitled to be confronted with his prior statement.

Mr. Bernsteen: I will give it to him, and also the other one. I have it.

The Court: I understood him to say this time that he relayed the signal.

Q. This time you say you relayed the signal?

A. I relayed the signal but I couldn't see the engineer.

Q. Didn't you say last Tuesday evening that you signaled the engineer?

[fol. 122] Mr. Bernsteen: Let me find that.

The Court: What was the answer?

Mr. Toll: The question was, "Now, when he swung down, what if anything did you do?" Answer: "I swung down. I repeated the signal to the engineer."

Mr. Kinder: Oh, that is an entirely different matter. Talking about the swing-down signal. Bernsteen is talking about the signal to come through the switch.

Mr. Bernsteen: Well, I will take last—you find, Mr. Clark, and I will find last time's testimony. Well, let's start over again.

Q. You say you passed it to the engineer. You passed it through. You couldn't see the engineer, you say?

A. No, sir.

Q. All right. Then the cars went down, didn't they?

A. Yes.

Q. Didn't they?

A. Yes.

Q. And then the attempt was made at the coupling, wasn't it? Is that right?

A. The attempt was made to couple.

Q. And they didn't couple, did they?

A. No, sir.

Q. But before that, you got a signal, a swing-down signal, from Mr. Gilvary, when they didn't couple; isn't that correct? When they didn't couple?

A. I got a signal; yes, sir.

Q. And what did you do with that signal?

A. I relayed that.

Q. To whom?

A. To Mr. Skuce.

Q. Didn't you say you passed it to the engineer, at the former trial?

A. I don't know.

Q. I will ask you this question. Was this question asked you and this answer given by you?

[fol. 123] Mr. Kinder: What page is that?

Mr. Bernsteen: On page 101 of our record.

Q. Was this question asked you: "You saw Mr. Gilvary swing down?" Answer: "Yes, sir." Question: "What did you do when you saw him swing down?" Answer: "I

passed the signal on to the engineer." Did you say that?

A. I can't remember.

Q. Did you or didn't you say that?

A. I can't recall now, whether I did or not. I know that I gave the signal that Mr. Gilvary gave.

Q. Did you or did you not make that statement, in the presence of a jury, at the last trial?

The Court: The witness says he can't recall, which is equivalent to a positive answer.

Q. Now, I will keep on reading. Question: "And by repeating it?" Answer: "Yes, sir." Question: "Now a swing down means to stop, doesn't it?" Answer: "Stop." Question: "And did the engine stop?" Answer: "Well, yes. It stopped." Question: "Well, it didn't I suppose it stopped after the engineer saw your signal and put on his brakes?" Answer: "Yes, sir."

Mr. Kinder: What page?

Mr. Bernsteen: This is your examination.

Mr. Kinder: What page? I can't locate it.

Mr. Bernsteen: My record was——

Mr. Kinder: What is it—the cross-examination?

Mr. Bernsteen: No, the direct examination.

Mr. Kinder: Mine isn't numbered right, so I don't suppose I can locate it. Go ahead.

Q. Mr. Kinder asked you this question: "I suppose it stopped after the engineer saw your signal and put on his [fol. 124] brakes?" and your answer was, "Yes, sir." Now, was that question asked you? I will repeat it again. "I suppose it stopped after the engineer saw your signal and put on his brakes?" And you answered, "Yes, sir." Was that question asked you by Mr. Kinder, and did you give that answer?

A. I believe I recall that.

Q. You did say that?

A. Yes.

Q. And was that true or was it untrue?

Mr. Kinder: I object to that.

The Court: Sustained. Mere supposition, any way.

Q. Now, was this question asked you, last Tuesday, by Mr. Kinder: "Now, when he swung down, what if anything

did you do?" Answer: "I swung down. I repeated the signal to the engineer." Did you say that or didn't you say that, last Tuesday?

A. I believe I did.

The Court: State if you remember. If you don't remember, say so.

The Witness: I can't recall just now.

Q. You say you gave the signal to Mr. Skuce and not to the engineer?

Mr. Kinder: We object to that, if your Honor please. That has been gone into four or five times, now.

Mr. Bernsteen: I think it is a very important thing, your Honor please.

Mr. Kinder: Well, now, I would like to be heard on that.

Mr. Bernsteen: All right. Go ahead.

The Court: Well, gentlemen, the Court will ask you, if I want argument.

Mr. Kinder: I see.

[fol. 125] The Court: If you are in doubt about his answer, you may ask again, but as I understand his answer——

Q. Did you give the signal to Mr. Skuce or to the engineer?

A. Which signal, now, do you mean—at what time?

Q. At the time Mr. Gilvary swung you down.

A. It is natural that you pass signals, when you have a man-down, it would be relayed to the front man, even though the engineer was in sight.

Mr. Bernsteen: May I ask that answer to go out, your Honor please?

Mr. Kinder: I insist that it stand.

Mr. Bernsteen: I asked him who gave the signal.

The Court: It is not responsive. Ask him what he did, and let him answer once more.

Q. What did you do when you got a swing-down signal from Mr. Gilvary?

A. I relayed the signal or gave the signal as he gave it.

Q. To whom?

A. Well, it would be to the front man, at first, because he was between me and the engine.

Q. Did you give it to the engineer?

A. It was intended—I couldn't say whether the engineer was really in my sight or not. I left a man there for that purpose, to take the signal.

Q. Was the engineer in your sight when you gave the signal?

A. On the east track, I don't know whether he was, just when it backed, in sight or not. I don't think he was.

Q. Was he or wasn't he?

A. No, I don't think he was; no, sir.

[fol. 126] Q. Or don't you know?

A. I will say no, he wasn't in sight.

Q. Now, when you stood at the switch, Mr. Melvin, did the cars go by you—some cars?

A. Yes, sir.

Q. How many?

A. I would say about two.

Q. And what did you do when they went by?

A. I was taking the number.

Q. With a pencil and paper?

A. Yes.

Q. Kind of writing?

A. Yes.

Q. By the way, there is some slope to that track. Is there a grade to the track?

A. Yes, sir.

Q. A grade down toward the north, or down toward the south?

A. The north.

Q. Grade down to the north? Is there a curve in that track?

A. Yes, sir.

Q. What kind of a curve?

A. Well, you mean what degree?

Q. No, what kind? Was that a slight curve?

A. Well, it isn't a very heavy curve.

Q. Was it a slight curve?

Mr. Kinder: I object to that, "slight curve."

The Court: Sustained as a conclusion. He has asked you for the degree, if you want to give it.

Q. Was it much of a——

Mr. Bernsteen: Well, all right.

Q. Do you remember, at the former trial, how you answered that question? You said it was a slight curve, did you not?

Mr. Kinder; I object to that question.

The Court: He has already said it now.

Mr. Bernsteen: All right.

[fol. 127] Q. Now, when—you saw Gilvary give the swing-down signal?

A. I did.

Q. Did the cars stop?

A. Yes, sir.

Q. And after the cars stopped, did you look again toward Gilvary?

A. After the cars stopped? I looked towards where he was, yes.

Q. And when you gave your signal toward the front end, I suppose you looked toward the front end, didn't you, when you gave your signal?

A. To the front end of the——

Q. When you got the swing-down signal from Mr. Gilvary, and relayed it toward the front end, did you look toward the front end when you gave your signal?

A. No, sir.

Q. Didn't you look, at all? Where were you looking?

A. I was looking back toward Mr. Gilvary.

Q. All the time?

A. Right at that time; yes.

Q. Then the cars stopped, didn't they?

A. Yes.

Q. And then, after the cars stopped, Mr. Gilvary went in, didn't he?

A. Yes, sir.

Q. And then they moved again, didn't they?

A. Well, I couldn't just say it was. The cars stopped real quick, and then there was a kind of an impact.

Q. Did the cars stop, then, before Mr. Gilvary went in?

A. Before he went in? When the cars stopped, he went in.

Q. After the cars stopped?

A. When the engineer took the signal, the cars stopped with a very sudden jerk.

Q. Is that the ordinary stop, with a sudden jerk?

A. Ordinary?

Q. Yes.

A. Well, it wasn't much out of the ordinary.

[fol. 128] Q. Was it light or dark?

A. Light.

Q. How did you give your signals? How did you give your signals? By hand?

A. By hand.

Q. Didn't have a lantern in your hand, did you?

A. I don't think so.

Q. About 5:30 or 6:00 o'clock in the evening, wasn't it?

A. I can't just recall exactly the time.

Q. Now, you ran down there after he was hurt, and was there a colored man there, do you remember?

A. Quite a number of colored men there.

Q. And do you remember a colored man tearing off a piece of his overalls and tied up the arm?

A. He tore off some kind of a garment. I don't remember.

Q. And then you went over to the dispensary, is that correct, with Mr. Gilvary?

A. We bandaged up his arm and went to the dispensary.

Q. Yes, and then you came back?

A. Yes, sir.

Q. When you came back, who was there?

A. Mr. Keppers, the car inspector, one or two. I don't remember whether anybody else——

Q. And the engineer and fireman. Is that right—your crew?

A. They were on the——

Q. Anybody else?

Mr. Kinder: Wait a minute. He says they were upon the engine. You shut off his answer, there.

Mr. Bernsteen: All right.

Q. Who was there when you got back?

A. You mean, where the cars were, or——

Q. No, no. After they got through, and you came back. You came back from the hospital, or the dispensary, and you came back to your job, didn't you?

A. Yes.

[fol. 129] Q. You came back there? Who was there, if anybody?

A. Well, the crew. That is, all with the exception of Mr. Gilvary, and Skuce; and the yardmaster, and a car inspector.

Q. Well, now, who were the crew?

A. Myself, engineer and fireman.

Q. And the car inspector, and Mr. Keppers, the yardmaster—you five men were there?

A. And I don't remember whether my other brakeman had reported yet or not.

Q. Well, had he?

A. I can't recall. I believe he was. I'll say——

Q. What was his name?

A. He is a southerner. I can't recall his name. Southern brogue.

Q. Had any of the inspections been made when you got back, or was any inspection made after you got back, by the inspector?

A. I don't know whether the inspection of—I don't know whether he looked the cars over before I came back, but the inspection was made after I got back.

Q. Inspection made after you got back?

A. Yes, sir.

Q. By whom?

A. By the car inspector, and Mr. Keppers. Certain parts of it, by myself.

Q. Was this question asked of you at the last trial and this answer given by you? Questions asked by Mr. Kinder. Question: "Now, did the inspector go over these couplers in your presence?" Answer: "I don't believe he went over them. He didn't do that in my presence, right there, because he had been there before that." Now, did he inspect them before or after you got there?

A. As I say, the cars—he was there when I left. I can't [fol. 130] say just exactly whether he—what he did to the cars, but I know he did go over some of the cars, or some of the work, after I came back.

Q. All right. And when the cars were—then I suppose they were coupled together, were they not?

A. No. They were not coupled.

Q. Well, after he started to inspect them—after that, a movement was made, wasn't there, to pull them apart?

A. Well, they had not been coupled.

Q. Well, all right. Now, I mean this: the couplers were together, weren't they?

A. The knuckles were shut.

Q. The knuckles were together, and then the cars were pulled apart, weren't they?

A. Yes, sir.
Q. Who gave the signal for that?
A. I did.
Q. To whom?
A. Well, I just relayed it to the other brakeman.
Q. How is that?
A. I just relayed it to the other brakeman.
Q. Didn't you give it to the engineer?
A. To the engineer?
Q. Yes.
A. I don't know, whether I could see—I don't think I could see the engineer.
Q. When you got back, and the signal was given, you pulled those cars apart and you stood at the same place you were when Mr. Gilvary was—when he gave the signal, is that correct?
A. Yes.
Q. Did you give the signal at that time to the engineer?
A. I couldn't.
Q. We'll find that in a moment, and we will go back to it. Was there a go-ahead signal given to you by Mr. Gilvary?
A. No.
[fol. 131] Q. By Mr. Gilvary?
A. No, sir.
Q. How many signals were given by Mr. Gilvary?
A. Only of the swing-down.
Q. How's that?
A. The swing-down.
Q. Only one? Is that correct?
A. That is all.
Q. And that is the signal you gave to Mr. Skuce?
A. Yes, sir.
Q. And that is the only signal you gave to Mr. Skuce?
A. The only one.
Q. Now, when you got back, did you have to adjust the draw-bars? I believe you said you did, did you not?
A. Yes, sir.
Q. Did you adjust the draw-bar on both cars?
A. I just can't recall whether I adjusted the draw-bars on both cars, or whether I adjusted them just on one.
Q. Which one did you adjust it on?
A. I know I adjusted on the B. & O.
Q. Well, didn't you adjust it upon the other car, too?
A. I can't recall that, whether I did or not.

Q. Now, going back for a moment, again, you say that when the cars were pulled apart, and then you gave a signal to the engineer, and then later you gave the engineer a signal to back back again, didn't you, and coupled on?

A. I relayed the signal from there.

Q. All right. The engineer, now—how far did he pull the cars apart?

A. I would say about six or eight feet.

Q. Six or eight feet? And then the cars came back and tried to couple on; isn't that correct?

A. After we had signaled them back.

Q. Well, who gave the signal?

A. To bring it back the last time?

[fol. 132] Q. Yes.

A. I gave the signal for him to back up.

Q. Who did you give it to?

A. Well, I would have to relay it to somebody.

Q. Well, who did you relay it to?

A. I just said, I can't recall whether——

Q. Did you give it to the engineer?

A. No.

Mr. Kinder: Let the witness finish his answer, Max.

Q. I will ask you whether this question was asked you and this answer was given by you: "After you opened the knuckles on the cars and adjusted the draw-bars, what did you have the engineer do, or the engine of the train do?" Answer: "Back up and couple onto them." Question: "Did you signal the engineer to move back?" Answer: "Yes." Did you say that?

A. If I did, that is a railroad phrase, and when we give a signal, regardless of whether it is relayed or not, it is a signal to back up, and that is the way I meant it.

Q. Now, how many attempts were made?

A. I beg your pardon?

Q. How many attempts were made to couple onto these cars?

A. How many attempts were made?

Q. Yes, before, at the time of the accident.

A. Before, and the time——

Q. No, at the time of the accident, how many attempts were made to couple on?

A. One.

Q. Wasn't it two attempts?

Mr. Kinder: Object to that question. The witness has just said "one."

Mr. Bernsteen: Let me cross-examine, your Honor please.

Mr. Kinder: Well, I know. Object to it.

[fol. 133] The Court: You have asked the witness three times, and he has answered each time, there was but one attempt made.

Q. Now, Mr. Melvin, do you remember, a year ago last summer, you were at the home of Mr. Gilvary, you and your family? You remember that?

A. I was there several times.

Q. And you remember that you were over there with your family, a year ago last June or July, in the summertime, and you had your family, and you all had dinner at Mr. Gilvary's home. Do you remember that?

A. I was there several times.

Q. You remember the incident when you had your family and had dinner there at his home?

A. I believe I was there, yes, sir, maybe three times, for lunch. I don't think it was dinner.

Q. And you remember after dinner you and Mr. Gilvary sat on the porch?

A. I think we sat on the porch every time we were there.

Q. And do you remember one time that you and Mr. Gilvary discussed this accident?

A. Just talked over the accident?

Q. Yes, about this accident.

A. I don't recall.

Q. And do you recall you said to Mr. Gilvary that afternoon on his porch, while the children were out in the back yard, after dinner, "I don't know whether or not it was a first or a second attempt at the coupling"?

A. No, sir.

Q. "When you were hurt."

A. Never did.

Mr. Kinder: Object to the question.

The Court: He said he did not.

Q. Do you remember, two or three months ago, of calling Mr. Gilvary up by phone and inviting him over to your resi-

[fol. 134] dence where you were rooming, on West 83rd street?

A. Inviting him over? No, I never did.

Q. Or do you remember of him coming over to your residence?

A. Yes, sir; he did.

Q. And you remember discussing something about a typewriter, at that time?

Mr. Kinder: When was this, Max? I didn't hear.

Mr. Bernsteen: About two or three months ago.

A. I sold Mr. Gilvary a typewriter.

Q. Well, was there any discussion between you and Mr. Gilvary—I just want to get that incident in your mind—any discussion about a typewriter, to bring that point of recollection in your mind. You remember that?

A. Yes, sir.

Q. And do you remember saying to Mr. Gilvary, "I can't see you any more, because my job is at stake"?

A. No, sir.

Mr. Kinder: Now, wait a minute. I object to that question, as obviously improper, and request the Court to instruct the jury to disregard the question, irrespective of the answer.

The Court: Not if Counsel expect to introduce evidence to contradict it. It has no materiality. It isn't offered as proof in any respect, as to this accident; simply a question affecting the credibility of the witness. The jury will so understand.

Mr. Kinder: Exception.

The Court: It may stand.

Q. Answer the question.

The Court: He answered.

Mr. Bernsteen: The answer is "no"?

Mr. Toll: The answer is "no."

[fol. 135] Q. Was your answer "no" to that question?

A. No.

(Witness excused.)

ALVIN CORNELL, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

The Court: Give your name to the stenographer, please.

A. Alvin Cornell.

By Mr. Kinder:

Q. Your name is Alvin Cornell?

A. Yes, sir.

Q. You are a resident of Cleveland?

A. Yes, sir.

Q. And are employed by the Cuyahoga Valley Railroad Company?

A. Yes, sir.

Q. And have been employed by that company how long, Mr. Cornell?

A. Four years and five months.

Q. And your position out there is a locomotive engineer?

A. Yes, sir.

Q. And you were the engineer of the crew on which Mr. Gilvary was a member, the day he was hurt, were you not?

A. Yes, sir.

Q. I shan't attempt to go through all the moves which you made on your engine between the time you went to work and the time of the accident. As I understand it, you had pulled out of the west track—pulled out along the west track with six or seven cars behind your engine. Is that right?

A. Yes, sir.

Q. And your engine was headed north, and putting you on the east side of the engine. Is that right?

A. Yes, sir.

[fol. 136] Q. Then after, you pulled back to clear this switch, and the movement at the time of the accident was back in on the east track; is that correct?

A. Yes, sir.

Q. Now, who was your head brakeman?

A. Mr. Skuce.

Q. And the head brakeman is the man who stays in the neighborhood of the engine; is that right?

A. Yes, sir.

Q. Either on or, when you are signalling, on the ground; is that correct?

A. Yes, sir.

Q. Now, from whom did you get the signal? From what person did you get the signal to move back in there?

A. Mr. Skuce.

Q. And did you respond to that signal by moving backwards?

A. Yes, sir.

Q. Now, where was Mr. Skuce with reference to your engine, when you got that back-up signal from him?

A. He was by the head car.

Q. The head car?

A. Yes, sir.

Q. You mean the car immediately attached to the engine?

A. Yes, sir.

Q. Now, there is a tank car for coal and water, that is hooked immediately to your engine, isn't there?

A. Yes, sir.

Q. And how high does the tank and coal pile come up from the floor of the locomotive?

A. From the floor of the locomotive?

Q. Yes. How high above the floor, about?

A. Oh, about six feet.

Q. About six feet? You recall what kind of a car it was that was hooked onto the tank car, what type of car?

A. I don't know. It was a gondola.

[fol. 137] Q. Gondola. Now, in response to that signal from Skuce, you started your train in motion, back, backing up, did you?

A. Yes, sir.

Q. And it kept on moving? Did you get another signal from Skuce?

A. After I had backed up?

Q. Yes.

A. The next signal I received was a stop signal.

Q. Stop signal?

A. Yes, sir.

Q. From whom did you get that?

A. Mr. Skuce.

Q. Now, do you know whether that could you tell on your engine, whether or not the seventh car from it had come in contact with other cars, at the time of the swing down signal?

A. No, sir.

Q. So you got a swing-down signal from Skuce?

A. Yes, sir.

Q. What did you then do?

A. Stopped the engine.

Q. You stopped?

A. Applied the air, and the engine stopped.

Q. What next signal did you get, if you got any?

A. That is all the signals I received.

Q. Now, after you got this swing-down signal, and after you stopped, what was the next thing that happened?

A. Mr. Skuce started to running down towards the hind end of the "drag."

Q. After you got that signal to stop, the first signal, did Skuce give you any signal to move ahead and back up?

A. No, sir.

Q. That was the only signal you got prior to the accident; is that right?

A. Yes, sir.

Q. And you saw Mr. Skuce run down there, running down towards the rear end; is that correct?

A. Yes, sir.

[fol. 138] Q. When you got the signal, the first signal from Skuce to back up, approximately where was your engine with reference to the switch that runs off the running track into the west track, do you recall, as to whether you were north or south of that?

A. Of the switch running into the slab yard?

Q. Yes, running in. There is a running-track there, and a switch leads off of there and becomes the west track.

A. I was just about at the switch.

Q. Just about at the switch? Now, immediately south of that point, the switch-point, there is a curve in the west track, is there not?

A. Yes, sir.

Q. I want you to tell the jury whether or not, from your engine, it was possible for you to see down to where the cars were standing on the east track?

A. No, sir.

Q. Now, do you recall approximately how far you had moved before you got this swing-down signal?

A. I don't just remember approximately how far I moved. I would say about a car-length and a half.

Q. A car-length and a half? Was it possible, at the time, in the position your engine was at the time you got this swing-down signal, to see a man who was at the place where the cars were coupled?

A. No, sir.

Q. Now, I wish you would explain to the jury why that was.

A. There is a curve obstructs the view. I was—the engine was on the curve, and therefore I couldn't see around the curve, to see the hind man.

Q. Now, did you help take Mr. Gilvary over to the dispensary, or did somebody else do that?

A. Somebody else. I stayed with the engine.

Q. Did you at any time inspect the couplers on these cars?

A. No, sir.

[fol. 139] Q. And you, as I understand it, couldn't see the accident from your place in the cab?

A. No, sir.

Q. And have no personal knowledge about how it occurred; is that right?

A. No, sir.

Cross-examination of Alvin Cornell.

By Mr. Bernsteen:

Q. You say, from the point on the curve you couldn't see the hind man, Mr. Gilvary?

A. No, sir.

Q. Well, could you see the engineer?

A. The engineer?

Q. I mean, could you see the conductor?

A. No, sir.

Q. Now, how many cars did you have?

A. Six cars.

Q. And after the swing-down signal had been made for the coupling, how many—how far were you from the—how many cars were you from the switch, after you had moved in?

A. From which switch?

Q. That switch that the conductor had thrown to get into the east track?

A. The conductor threw the east track switch.

Q. And then he moved in, did you? Then you moved back?

A. I moved into the east track.

Q. How far did you move into the east track?

A. About a car-length and a half.

Q. And how far were you from the switch when you moved in the car-length and a half?

A. About five car-lengths.

Q. About five car-lengths? How many feet in a car-length?

A. About forty-five.

Q. Between forty-five—usually forty, isn't it?

A. No, sir.

[fol. 140] Q. Or forty-five? That's about 220 or 225 feet, isn't that correct?

A. No, sir. It is about three hundred feet.

Q. Three hundred feet? Well, let's see. You had four cars, is that right?

A. Six cars.

Q. Four cars?

A. I had six cars.

Q. All right. You were 300 feet? You were 300 feet, if the tender was standing at the switch, is that correct?

A. I don't know——

Q. If he had been standing at the switch, you would be 300 feet away from him; is that correct?

A. When I had stopped?

Q. When you stopped?

A. No.

Q. Well; how far were you from the switch when you stopped?

A. About five car-lengths. The end of the engine was about five car-lengths from the switch.

Q. And how many feet in a car-length?

A. Forty-five. About forty-five.

Q. So you were about 225 feet, approximately; is that correct?

A. From the switch.

Q. From the switch, when you stopped?

A. I don't know. I would have to figure that out.
Q. Well, five times 45?

The Court: It is matter of calculation.
Mr. Bernsteen: All right.

Q. And you mean to say that in five car-lengths from the switch, you couldn't see the conductor if he was standing there; is that correct?
A. Yes, sir.
Q. On account of the curve?
A. Yes, sir.
Q. Is that right? What kind of a curve was it?
A. What do you mean—the radius of the curve, or——
[fol. 141] Q. How?
A. What do you mean? The radius of the curve?
Q. No. What kind of a curve was it?

The Court: He is asking you what you mean.

Q. Well, was it a sharp curve, or a slight curve? What kind of a curve was it?
A. Well, it is a sharp curve.
Q. It is a sharp curve? Where were you Tuesday morning, before you came here?
A. Tuesday morning, before I came here?
Q. Yes.
A. Mr. Kinder's office.
Q. Was Mr. Skuce there with you?
A. Yes, sir.
Q. And the rest of the crew?
A. Yes, sir.
Q. And were you there Monday morning?
A. Yes, sir.
Q. And were you there one day last week?
A. Yes, sir.
Q. And was Mr. Robertson there?
A. Yes, sir.
Q. And talked about this case to anybody?
A. Yes, sir.
Q. Did Mr. Skuce talk about the case too, among you's?
A. Yes, sir.

Mr. Kinder: Who?
Mr. Bernsteen: Mr. Skuce.

Q. Was Mr. Skuce down here to court Tuesday with you boys?

A. We weren't in court Tuesday.

Q. Were you down here at the court-house at all Tuesday afternoon?

A. No, sir.

Q. When Mr. Melvin testified?

A. Oh, yes—Tuesday. I was mistaken. Armistice Day, next day.

Q. Was Mr. Skuce there with you?

A. Yes, sir.

[fol. 142] Redirect examination of Alvin Cornell.

By Mr. Kinder:

Q. Mr. Cornell, these times that you were at my office, you were with the witnesses, waiting to come down for the trial of the case, were you not?

A. Yes, sir.

Q. And you were interrogated by me in my office with respect to what you knew about this accident; is that right?

A. Yes, sir.

Q. And the same thing occurred prior to the previous trial; is that right?

A. Yes, sir.

Q. And I asked you what you knew about it, and you told me, just as you are telling here, isn't that right?

A. Yes, sir.

Recross-examination of Alvin Cornell.

By Mr. Bernsteen:

Q. How old are you, Mr. Cornell?

A. Twenty-six.

Q. Twenty-six?

A. Yes, sir.

Q. How long have you been an engineer?

A. Two years and ten months.

Q. And before you were an engineer, how long were you with the railroad?

The Court: Take the stand.

Q. How long were you working for the Cuyahoga Valley?

A. Four years and five months.

Q. And how long were you a brakeman? I mean, a conductor—a fireman?

A. About a year and a half.

Q. And then you became an engineer?

A. Yes, sir.

(Witness excused.)

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[fol. 143] MICHAEL BAWOLAK, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Your name is "Mike" Bawolak?

A. Yes, sir.

Q. B-a-v-a-l-a-k, is it not?

A. B-a-w-o-l-a-k.

Q. And you live in Cleveland, do you, Mr. Bawolak?

A. Yes, sir.

Q. And are employed by the Cuyahoga Valley Railway Company?

A. Yes, sir.

Q. For how long have you been with that company?

A. Nine years.

Q. And you are car inspector there?

A. Yes, sir.

Q. Car inspector, has to do with the inspection of cars and the equipment, like couplers and brakes, and so forth, on a car?

A. Yes, sir.

Q. And it is your job to inspect cars when they come in, and inspect cars in the plant; is that right?

A. When they come in, and in the plant.

Q. Now, prior to this nine years that you have been with the Cuyahoga Valley, have you had any other railroad experience?

A. Yes, sir.

Q. And what company were you with?

A. Pennsylvania Railroad.

Q. And how long were you with the Pennsylvaina Railroad?

A. Seventeen years.

Q. As a car inspector and repairman?

A. Yes, sir.

Q. So you are familiar, I assume, from years of experience, with couplers and draw-bars, are you not?

A. Yes, sir.

[fol. 144] Q. Now, you remember the accident when Mr. Gilvary was hurt, down in the slab mill yard?

A. Yes, sir.

Q. Where were you when you first heard that there had been an accident?

A. I was on my way going home, by the gate.

Q. By the gate? And who did you see there? Who told you about it?

A. The yardmaster, Mr. Keppers.

Q. Mr. Keppers?

A. Yes.

Q. And did Mr. Keppers request you to make any inspection of the cars?

A. Yes, sir.

Q. And did you go there where the cars were?

A. Yes, sir.

Q. The cars were located on this—what you men call the east track, were they not?

A. Yes. Yes, sir.

Q. In the yards? And who was there at the time you got there?

A. Mr. Keppers and Mr. Melvin, the conductor.

Q. The conductor? Mr. Gilvary had been taken away to the dispensary, as you understood it, had he?

A. Yes, sir.

Q. At least, he wasn't there?

A. No.

Q. Now, will you tell—by the way, you made a record of your inspection of the cars at that time, did you not?

A. I did.

Q. And I will ask you if you inspected the P., McK. & Y. 63979? What does that "H" stand for? Is that "hopper"?

A. "Hopper."

Q. And B. & O. 150196, gondola? A. Gondola. Yes, sir.

Q. And is this, Defendant's Exhibit 3, your report?

A. That is my report.

[fol. 145] Q. And did you make that report the same day of the inspection?

A. I make a notation the same day, and I make this report the following morning.

Q. So that there is no question about the identity of the cars that you inspected?

A. Yes.

Q. Now, when you got down there, Mr. Bawolak, in what position were the cars—the two—the P., McK. car, and the Baltimore & Ohio car, so far as whether their couplers were together or not?

A. The coupler was one against the other. Wasn't coupling.

Q. Were the knuckles closed on both cars?

A. Yes, sir.

Q. And when you say that the cars were together, you mean that the knuckle of this car was just like that (indicating)?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And that was closed?

A. That was closed.

Q. Now, you went down there at the request of the yardmaster to make an inspection of these couplers, did you?

A. Yes, sir.

Q. Did you inspect them?

A. I certainly did.

Q. Were the cars pulled apart after you got there?

A. I told the conductor and the yardmaster to pull the cars apart so I can examine the couplers.

Q. And how far apart did they pull the cars, do you remember?

A. I can judge from about six to eight feet apart, to get around.

Q. Now, what did you do? What do you inspectors do when you come to examine, and to inspect a coupler?

A. We lift the pin, like that (indicating).

Q. That is, you use the cutting-lever?

A. Yes.

Q. Did you use the cutting-lever on both of these cars?

A. Yes, sir.

[fol. 146] Q. Tell the jury whether or not the cutting-lever worked?

A. They was O. K. condition.

Q. And by that you mean when you pulled the cutting-lever up?

A. Yes.

Q. —why, the pin came up, and the knuckle opened?

A. Yes, properly opened.

Q. Now, was there anything? You got these knuckles open, here. Did you look at them to see if there was anything broken?

A. Absolutely did.

Q. Did you look at them to see whether this housing was cracked or anything?

A. I looked at that, every way, to see for the defect, if there was any defect.

Q. And from your examination, what do you say to this jury as to whether either of those couplers were defective?

A. No, sir.

Q. Now, Mr. Bawolak, there is some play in the draw-bar of a coupler, is there not—side-play?

A. Yes, sir.

Q. Move back and forth?

A. Yes, sir.

Q. Now, that draw-bar is in a kind of a metal housing?

A. It is what they call a "buffer casting." Malleable iron.

Q. And that slides in a—what do you call it—buffer block?

A. Buffer casting.

Q. Is that metal?

A. That is malleable iron. That is supposed to be to stand jar, but they crack sometimes.

Q. Now, did you work the draw-bars, so you can tell the jury whether or not the side-play in the draw-bars was the proper amount?

A. I examined the couplers. Was good condition. I examined the lock-pin, knuckle, and they was A-No. 1 condition, and I leave both couplers open, and give to the conductor to couple it up.

[fol. 147] Q. That is to say, you examined it, and with the knuckles open, you told the conductor to couple up?

A. Yes.

Q. Was the coupling attempted? Did they couple up?
A. I lined it up, and they coupled up; yes.
Q. Now, you used the words, "I lined it up." What do you mean by that?
A. Straighten up, one with the other; leave both knuckles open; so they sure make a coupling.
Q. Leave both knuckles open?
A. Yes.
Q. And lined them up by adjusting the draw-bars, did you?
A. Yes.
Q. Is there some play of the draw-bar in this buffer block that you talk about—some play?
A. It is.
Q. Now, what do you say as to whether or not there was the proper amount of play in there?

Mr. Bernsteen: Your Honor please, I think this man should tell what he found.

The Court: Very well. I have been waiting for that objection. All leading throughout. Let the witness tell without leading. Sustained.

Q. Now, what do you say, Mr. Bawolak? What did you find, there, with respect to the play in the coupler?
A. The coupler was in A-No. 1 condition when I found it.

Mr. Bernsteen: I ask the answer go out, your Honor please.

The Court: No, he is qualified. The answer may stand.

Q. Now, I think we went over this, but after you lined it up, opened the knuckles and had the conductor move the train back, did the couplers couple then?
[fol. 148] A. When the conductor gave motion for coupling, they was made coupling.
Q. The coupling made?
A. Yes.
Q. When the two cars came together?
A. Yes.
Q. How much play, if you know, is allowed in a draw-bar so far as this buffer block is concerned?
A. Not any more than three inches.
Q. Three inches?
A. In the buffer casting, "U" buffer casting.

Cross-examination of Michael Bawolak.

By Mr. Bernsteen:

Q. You say the conductor gave a motion? What do you mean? He gave a signal?

A. Yes.

Q. To whom?

A. To a—probably a brakeman, and a conductor, to the engineer, to make a coupling.

Q. Well, you were there, weren't you?

A. I were there.

Q. Was the conductor right near you when he gave this signal?

A. Right in front of me.

Q. Who did he give the signal to?

A. To the head man.

Q. Did he give it to the engineer?

A. I suppose, yes.

Q. Did the conductor give it to the engineer?

A. He gave it to the head man and the engineer, yes.

Q. Who is the head man?

A. Mr. Skuce.

Q. Was Mr. Skuce there after the accident?

A. I think he was.

[fol. 149] Q. And you say that Mr.—the conductor gave it to Mr. Skuce, after the accident?

A. Yes.

Q. You remember testifying at the former trial, and this question asked you by myself? "Question: You saw two men give the signal, or one man give the signal?" Your answer was, "The signal of the conductor was right there." Question: "He gave the signal?" Answer: "Yes." Question: "To whom?" Answer: "To the engineer." Question: "That is to say, the conductor, from the point of the accident, gave a signal to the engineer, didn't he?" Your answer was, "Yes." Did you so testify at the last trial?

A. Well, conductor gave the signal, always gave the signal to the engineer, whether there was a brakeman there by the engine or not.

Q. Well, did you testify, last time, as I read it?

Mr. Kinder: Now, if, your Honor please, we are going to go into the previous testimony, I want to suggest that

it is only fair that Mr. Bernsteen read the entire testimony of the witness.

Mr. Bernsteen: I will, if the Court will permit it.

Mr. Kinder: It is perfectly apparent.

The Court: In the interest of time, it is a question, here, as to the materiality of it, anyway. If you want to show that the engineer could or could not have seen from that point, or somewhere else, I presume it is a matter of common knowledge as to how signals are transmitted in railroading, is it not?

Mr. Bernsteen: (Q.) Well, could the engineer be seen by the conductor from that point, or don't you know?

A. I can't recollect.

(Witness excused.)

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[fol. 150] E. B. Keppers, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Your name is E. B. Keppers?
A. Yes, sir.
Q. K-e-p-p-e-r-s, is that the way it is spelled?
A. Yes, sir.
Q. You are a resident of Cleveland, Mr. Keppers?
A. Yes, sir.
Q. And are connected with the Cuyahoga Valley Railway Company, are you not?
A. Yes, sir.
Q. What is your position there?
A. Conductor.
Q. Were you in the employ of the Cuyahoga Valley, in April of 1929, when Mr. Gilvary was hurt?
A. Yes, sir.
Q. And what was your position then?
A. Yardmaster.
Q. You were not at the scene of the accident when it occurred, I understand?
A No, sir.

Q. Where were you when you heard that Mr. Gilvary had been injured?

A. At the yard office.

Q. And what did you immediately do?

A. Went to the scene of the accident.

Q. Did you get down to where the accident had occurred?

A. Yes, sir.

Q. And was it on this east track?

A. Yes, sir.

Q. Now, was the engine of Gilvary's crew still standing there at the time you got down there?

A. Yes, sir; the north end of the slab yard.

Q. And by the "slab yard" you mean the slab-yard track?

A. Blooming mill, slab yard.

Q. Did you see the cars between which Mr. Gilvary had been hurt, at that time?

A. Yes, sir.

[fol. 151] Q. Were they together, so far as their couplers were concerned?

A. Yes, sir.

Q. Now, what did you do then?

A. I went to the dispensary to find out the extent of his injury.

Q. That is, you went to the scene of the accident, and then went to the dispensary?

A. Yes, sir.

Q. And when you got over to the dispensary, was Mr. Gilvary being taken care of there?

A. Yes, sir.

Q. How long were you at the dispensary?

A. Oh, possibly fifteen, twenty minutes.

Q. And after he was taken care of, was he taken to the hospital?

A. Yes, sir.

Q. Now, after Mr. Gilvary was taken to the hospital, what did you then do?

A. Started back to the scene of the accident.

Q. I will ask you whether or not you encountered or saw Mr. Bawolak, the car inspector, that evening?

A. I met him at the gate, going out.

Q. And what did you cause him to do?

A. To go back with me.

Q. And what was your purpose in having him, and also in your going back there?

A. To make an inspection of the cars.

Q. Now, the two of you went back, did you?

A. Yes, sir.

Q. And you got to the scene of this accident, did you?

A. Yes, sir.

Q. Now, those two cars, had they been moved when you got back with Bawolak? Had they been moved from the position that they were in when you first went over there?

A. No, sir.

Q. And the engine was still standing there, were they?

A. Yes, sir.

[fol. 152] Q. And the two couplers were together? Now, Mr. Keppers, did the car inspector make an inspection of those couplers, there, in your presence, that night?

A. Yes, sir.

Q. What was done with reference to the cars after you and Bawolak got there?

A. Bawolak just looker over the underframe of the cars, as he came along, and after he had looked over the safety appliances on the car, he asked the conductor to move the cars ahead.

Q. And were the cars moved ahead?

A. Yes, sir.

Q. Pursuant to that? And the two cars, between which the accident occurred, were pulled apart from each other?

A. Yes, sir.

Q. Now, after they got apart, did the car inspector make certain inspection and tests of the two couplers?

A. Yes, sir.

Q. And what did he do? Describe to the jury what the car inspector did on that occasion.

A. He opened and closed the knuckles on the two cars, three or four times, and he tried the lateral motion in the couplers.

Q. Did he use the cutting-lever?

A. Yes, sir.

Q. In opening the cars? Now, did you make any examination, or make any tests with the cutting-lever, there, that night?

A. I believe I opened the knuckle on one car.

Q. And what was the result of your test there? Did it operate properly? A. Yes, sir.

Q. Did you see anything broken about the coupler or about the pin, or about the knuckles—the pins or knuckles, there that night?

A. No, sir.

Q. Now, were the two cars recoupled there?

A. Yes, sir.

[fol. 153] Q. And who if anybody coupled those up?

A. Conductor Melvin.

Q. Was there any adjustment made? I will withdraw that. What was the condition of the knuckles on the cars when this attempt to recouple them was made? Were they open or closed?

A. Both knuckles were open when they——

Q. What was done, if anything, so far as the drawbars were concerned?

A. Melvin adjusted them—the draw-bar.

Q. And when you say he adjusted a draw-bar, what do you mean that he did?

A. He shoved it over.

Q. And after that, was the coupling completed?

A. Yes, sir.

Q. The cars came together, did they?

A. Yes, sir.

Q. And from your observation, there, what do you say, as a railroad man, as to whether or not either one of those couplers were defective?

A. I would say they wasn't.

Q. These cars, one of them is a Baltimore & Ohio gondola. About what length cars are those, do you know?

A. The Baltimore & Ohio, I believe, was a 46-foot car.

Q. And have you any idea how long the "Pee-Mickey" car was?

A. I don't recall. It was a 40 or a 42-feet.

Q. Now, when you got down there and found these cars together—I mean, before you made the inspection, state where, with reference to this curve, on the east track, the two cars were?

A. One was on the straight track, on the south—the south trucks of the north car were just about on the straight track.

[fol. 154] Q. And what do you say—where were the couplers with reference to this curve?

A. Just about at the curve.

Cross-examination of E. B. Keppers.

By Mr. Bernsteen:

Q. When you came over there, after you came from the dispensary, who was at the point of the accident?

A. Sir?

Q. When you got back from the dispensary—and you picked up the inspector, did you not?

A. Yes, sir.

Q. You went to the point of the accident?

A. Yes, sir.

Q. Who was there?

A. Why, the employees of the slab yard, is all I know of.

Q. Which of the crew was there?

A. Melvin came back with me, or followed me very shortly, I am not sure which.

Q. And who else of the crew was there?

A. The engineer and fireman.

Q. And was Mr. Skuce there?

A. I don't remember whether he went to the hospital with Gilvary, or whether he came back.

Q. Well, don't you remember he went to the hospital from the dispensary, with Mr. Gilvary?

A. I don't recall.

Q. Well, was Skuce back there, or wasn't he?

A. I don't recall.

Q. Now, the inspector opened these couplers, you say, with the lifting-lever?

A. Yes, sir.

Q. Now, this lifting-lever extends from here outward, does it not?

A. To the end of the car.

[fol. 155] Q. That is to say, this is not quite complete, that lever, is it?

A. No, sir.

Q. There should be a handle that runs from there out this way?

A. No, sir; not on all types of lifting-levers.

Q. Well, you just now said it wasn't complete. Is this coupler complete?

A. On the model, it is not complete. It doesn't extend to the end, to the block, or to the end of the car.

Q. Well, there is something extends from here out, doesn't there, so a man can hold it without going between the cars?

A. They are all right to the end of the car without going between them.

Q. I say, there is something extends from there out, isn't there?

A. Not on all types of cars.

Q. Well, on those two types of cars. You were there. Those two cars on which the coupling was made, these had a lifting-lever outward, from here, running down?

A. I couldn't say whether there was or not.

Q. How long were you there?

A. A few minutes.

Q. You are the yardmaster?

A. I was, at that time.

Q. And you had the man come in and inspect, purposely so you could see what caused—whether the coupler was in good shape or not?

A. Yes, sir.

Q. And you don't remember whether there was a handle, that runs out like this from the lifting-lever?

A. Some do. On some cars they do, and some cars they don't. Some are that type, and some are the cross-member type.

Q. Did these two cars have that? Did these two cars have this handle running out?

A. I don't remember.

[fol. 156] Q. Now, how did the inspector open these knuckles?

A. The lifting-lever.

Q. Did you see him take hold of the lifting-lever?

A. Yes, sir.

Q. What part of it did he take hold of?

A. Of the handle.

Q. And where was the handle?

A. At the end of a car.

Q. Is this the handle, here?

A. Not that handle.

Q. No. Well, is there a handle attached to this—was there?

A. I don't recall whether—I say some types of cars have a cross-member, and some have a horizontal member.

Q. I am talking about the handle of the car that you said you saw the inspector get hold of and open the knuckle. You say he got hold of the handle of the lifting-lever, didn't you?

A. Yes, sir.

Q. Now, where was that handle?

A. The end of the car.

Q. Well, show here on this model where it was?

A. If this had been the end of the car, it would be just around the buffer block, around the corner of the buffer block.

Q. So there was a handle to the lifting-lever, was there?

A. Sir?

Q. There was, then, an attachment to the lifting-lever? Or don't you remember?

A. There was a lifting-lever on the car.

Q. And was there a handle to it?

A. No doubt.

Q. Well, did you see the handle?

[fol. 157] Q. Now, did you open the lifting-lever with the handle?

A. Must have been, or he couldn't have got hold of it.

Q. Did they open—the knuckles—open right up?

A. He pulled the lever and opened the knuckle, and then closed it with his hand three or four times.

Q. Well, did he open it with his hands?

A. I don't believe he did. It isn't necessary.

Q. Was it necessary, that day?

A. I don't think so.

Q. I will ask you whether this question was asked of you, and this answer given by you at the last trial. "Then what was done?" Answer: "The car inspector opened and closed both knuckles." Question: "And how did he do that?" Answer: "By pulling the lifting-lever with one hand and operating the knuckle with the other hand." Did you so testify at the other trial?

A. Yes, sir.

Q. Is that the fact?

A. That is the way he was making his test, pulling it open with one hand and operating the knuckle with the other hand.

Q. And of course, when he puts his hand in there, he gets his hand between the cars, doesn't he?

A. He wouldn't at that time, no. The cars were separated.

Q. I mean, the cars were separated. You know what the Federal Safety Appliance Act is?

Mr. Kinder: I object to that.

Mr. Bernsteen: I asked if he knows about it. He is a skilled yardmaster out there.

The Court: Oh, if he does, say yes or no.

Q. Do you know about that?

A. Partially.

Q. And do you know whether or not it requires couplers so to work that men do not have to go between the cars to open the knuckle?

[fol. 158] Mr. Kinder: Objection.

A. Yes.

Q. You know that, but still this man went between, pushed his hand between this knuckle to open it up, didn't he?

A. He didn't use his hand to open the knuckle. He used his hand to close it, in making his test.

Q. Well, didn't you say at the last trial: "The car inspector opened and closed both knuckles." "How did he do that?" "By pulling the lifting-lever with one hand and operating the knuckle with the other hand." Isn't that correct?

A. Yes, sir.

Q. And you say when you came back there, both knuckles were together?

A. Yes, sir.

Q. Was there a grade there? They were both together, but uncoupled, weren't they? The knuckles were both together but uncoupled, isn't that correct?

A. Yes, sir.

Q. Was there a grade there?

A. From the curve north, yes, sir.

Q. From the curve north?

A. Yes, sir.

Q. Which car was on the curve, the hopper or the gondola?

A. The gondola.

Q. The hopper car was on the level and the gondola was on the grade?

A. Yes, sir.

Q. You know Mr. Skuce, do you not?
A. Yes, sir.
Q. And he was at the last trial, was he not?
A. Yes, sir.
Q. And he testified at the last trial, did he not?
A. I believe he did.

(Witness excused.)

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[fol. 159] CHARLES SKUCE, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Your name is Charles Skuce?
A. Yes, sir.
Q. And you are a resident of Cleveland, Mr. Skuce?
A. Yes, sir.
Q. Are you now an employee of the Cuyahoga Valley Railroad?
A. Not now, no, sir.
Q. You were, in April of 1929, when Mr. Gilvary was hurt, were you not?
A. Yes, sir.
Q. And what was your position on that crew?
A. Head brakeman.
Q. How long had you been with the company before that April?
A. Oh, I should judge around about four or five months, something like that.
Q. Prior to going with the Cuyahoga Valley, did you have railroad experience?
A. Yes, sir.
Q. And for how many years did you?
A. Oh, around ten to thirteen years.
Q. Now, as head brakeman of that crew, your position was on or near the engine, dependent on the particular business?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.

Q. Now, you remember the movement that resulted in Mr. Gilvary's injury, do you?

A. I do.

Q. Do you remember the movement back through the switch onto the east track?

A. I do; yes, sir.

Q. Who gave the signal to the engineer for that movement, do you remember?

A. I gave the signal.

Q. From whom did you get a signal?

A. Mr. Gilvary.

[fol. 160] Q. I am speaking, now, about you mean you got a signal to come back, from Mr. Gilvary?

A. Yes, sir.

Q. And where was he at that time?

A. He was back on the east track.

Q. Where was the conductor?

A. Between Mr. Gilvary and myself.

Q. Do you recall whether or not the conductor participated in relaying the signal?

Mr. Bernstein: Your Honor please, now that is just the thing I object to, your Honor please. I object to that question. Let the man testify.

Mr. Kinder: I will withdraw that.

Q. What if any signal did—well, let us find out. Where was the conductor at the time the engineer started to move the train back?

A. In regards to making this coupling, or——

Q. No, where with reference—do you know where the switch that goes in on the east track is?

A. Yes, sir.

Q. Where with reference to the switch was he?

A. The conductor was at the switch.

Q. Yes.

A. Going back to this here east track.

Q. Now, you got a signal from Gilvary, and you relayed it to the engineer, to move back in; is that correct?

A. Yes, sir. When Gilvary was back, making this coupling, now, I received his signal, first, coming back, from Mr. Melvin, the conductor.

Q. Well, I think maybe we are talking——

A. Off of the main, understand—off of the main, back to the——

The Court: Pardon me. The Court would suggest, I don't hear objections, but you should ask this witness to describe, and let him do it, without suggesting the question or the answer.

[fol. 161] Mr. Bernsteen: Listen, your Honor please, I don't want to object in front of this jury all the time, but he is an old-time lawyer, and he ought to know. I objected two or three times. This man ought to quit.

The Court: Don't lead the witness.

Mr. Kinder: Now, have you finished?

The Court: Please go ahead.

Q. Now, let us start in again. Before you backed in on this east track, state whether or not your train, your engine, had been in on the west track?

The Court: That is leading. "Where had his engine been before that?" Let him answer.

Q. Yes—where—what moves had you made just before?

A. We went back in the west track, first.

Q. Then what did you do?

A. Well, then we came out and made a pass or two, a switch or two.

Q. Yes.

A. And then we backed in on the east track.

Q. All right. Now, who threw the switch? Which member of your crew threw the switch for the movement in on the east track?

A. Mr. Melvin, the conductor.

Q. Now, who gave the signal for the movement in through that switch?

Mr. Bernsteen: Your Honor please, he answered that question.

The Court: Sustained. Objection sustained. Assumes there was a signal given at all.

A. Naturally——

Q. Was there a signal given for the movement of the engine and the cars in through the switch to the east track?

A. Yes, sir.

[fol. 162] Q. Who gave that signal?

A. Why, the man that throws the switch, Mr. Melvin, the conductor.

Mr. Bernsteen: I ask the answer be stricken, your Honor please.

The Court: (Q.) You mean by that, he did, or you are saying that was generally done? He is asking you, who gave the signal on that occasion.

The Witness: Mr. Melvin.

Q. What did you do after Mr. Melvin gave this signal?

A. Gave it to the engineer.

Q. What happened, then?

A. Well, the cars went back, and the coupling didn't make, and Mr. Gilvary gave a signal to stop.

Q. I see. Where were you when the coupling didn't make?

A. I should judge I was about three or four cars from the engine.

Q. Which way from the engine? South?

A. South.

Mr. Bernsteen: Now, your Honor please, there again he puts the answer in—I object.

The Court: Sustained. Mr. Kinder, the Court has told you, you must not cut across lots.

Mr. Kinder: Well, I apologize.

The Court: Let the witness answer. He is your witness.

Mr. Kinder: Well, I apologize, your Honor. Merely doing it——

The Court: Well, you know how to do it, so refrain.

Q. Which way from the engine were you when the coupling failed to make?

A. I was three cars from the engine, back of the engine, and I was about forty feet, I call this, I believe, south—that direction (indicating); so I could see Mr. Gilvary and the conductor.

[fol. 163] Q. I see. Now, when the coupling didn't make, what if anything did Mr. Gilvary do?

A. Gave a signal to stop.

Q. Well, describe that signal. What kind of a signal was it?

A. A signal to stop, this way (indicating). This is a stop signal (indicating).

Q. All right. What did you do, then?
A. I gave it to the engineer.
Q. State whether or not the train stopped?
A. The train did stop.
Q. Did you observe Gilvary, at the time the train stopped? Could you see Gilvary, at the time the train stopped?
A. Yes, sir.
Q. What if anything did he do?
A. He went in between the cars.
Q. And then tell the jury what happened?
A. Well, he came out, and he gave a signal to go ahead.
Q. Gave a signal to go ahead?
A. Yes, sir.
Q. And what did you do?
A. I gave it to the engineer.
Q. And what happened?
A. The engineer pulled ahead, about, oh, I should judge six feet.
Q. Yes?
A. And then we gave him a signal to stop.
Q. Who gave a signal?
A. Mr. Gilvary gave that to me, and I gave it to the engineer.
Q. And then what did you do?
A. I stood there, waiting to receive signals. Mr. Gilvary went in between the cars.
Q. Yes? Then what happened?
A. As near as I could figure out, it was slack from the back of—the rear of that track, came back.
[fol. 164] Q. Then what did you see him do?
A. Then Melvin gave a "wash-out" signal.
Q. Yes?
A. And I stood there for a minute. I gave it to the engineer, and then I stood there for a minute, and I seen Melvin running, and pretty soon he had hold of Mr. Gilvary, and brought him out and set him on a lot of slabs, iron slabs, and I ran down and helped get hold of him.
Q. Did you assist in taking him any place?
A. Did I take him any place?
Q. Yes.
A. Oh, we walked up towards the engine, and set him on a bunch of slabs up there, a pile of slabs, rather.

Q. Where, if any place, did you take him after the accident?

A. Why, we took him over to the hospital in an automobile.

Q. You mean the dispensary, there?

A. Dispensary hospital.

Q. And where from there was he taken?

A. To St. Luke's hospital.

Q. Did you go ahead and go with him?

A. I was the only one that went with Mr. Gilvary.

Q. Now, from where Gilvary was standing, at the time the first attempt was made, you said you were standing there and could see him—from where he was standing, state to this jury whether or not it would be possible for him to see the engineer of your train?

A. He couldn't see the engineer from where he was working.

Q. And why, Mr. Skuce, is that true, or why is that the fact?

A. Because there was a curve in that track.

Q. Did you make any inspection of those couplers there, to look them over?

A. I did not.

[fol. 165] Cross-examination of Charles Skuce.

By Mr. Bernsteen:

Q. You got a signal after the switch was thrown, from Mr. Gilvary; didn't you?

A. I got a signal from Mr. Melvin, when the switch was thrown.

Q. Were you in Mr. Kinder's office Tuesday of this week?

A. Tuesday, this week? I was called up there to see when I was going to be needed at this trial.

Q. Were you at his office Tuesday of this week, day before yesterday, in the morning?

A. This week?

Q. Yes.

A. I wasn't in his office this week. I was out in the lobby.

Q. You were out in the lobby, not in his office?

A. Not in his office, out in the lobby.

Q. Were you there Monday of this week?

A. Not in his office—out in the lobby.

Q. Now, do you remember this question was asked you at the last trial, and these answers given by you? "Question by Mr. Kinder: Do you recall who threw the switch that let the cars in on the east track from the west track? Answer: Very sure that Mr. Melvin, the conductor, threw that switch. Question: Do you know who gave the signal for the movement back, after the switch was thrown? Answer: Mr. Gilvary." Did you so testify at the last trial?

Mr. Kinder: What page are you reading from?

Mr. Bernsteen: That is the third page of your examination.

Q. Did you so testify?

A. A man throws a switch, a conductor or anybody throws a switch, he gives the signal, always, in railroading. [fol. 166] Q. That may be true. I am asking you whether or not—I will ask you again: "Question: Do you know who gave the signal for the movement back, after the switch was thrown?" And your answer was, "Mr. Gilvary." Did you so answer?

The Court: If you recall, say yes. If you don't recall, say so.

A. Why, I can't just recall, but I know this much; any man that throws a switch, he must give the signal. I might have said it. I can't recall.

Mr. Bernsteen: Now, your Honor please——

Q. Well, did you get any signals from the conductor?

A. I did, when he throwed the switch, yes, sir.

Q. All right. Did you get any other signals from the conductor?

A. I did; yes, sir.

Q. What other one?

A. A "wash-out" signal to stop.

Q. Did you get a swing-down signal from the conductor?

A. Yes, sir.

Q. Did you get a swing-down signal from the conductor, too?

A. I did—during this accident, I am speaking of.

Q. I am talking about that. Did you get any swing-down signal when Mr. Gilvary swung down? Did you get a swing-down signal from the conductor, or did you get it from Mr. Gilvary?

Mr. Kinder: Object to that, your Honor. He has already said he got a signal from the conductor, twice. I object to the question.

Q. I will ask you this question, then—you testified at the last trial, then: "Question: To whom did Gilvary give [fol. 167] the signal?" and your answer was, "To me."

A. To me.

Q. "Question: Didn't you get the signal from the conductor?" And your answer was, "No, sir.". You testified that way at the last trial?

Mr. Bernsteen: That is on the last page of my cross-examination.

Q. Did you testify at the last trial that way?

A. I got a signal from Gilvary, but after Gilvary got hurt, then I got a stop signal.

Q. From whom?

A. From Mr. Melvin, and I got one from Mr. Gilvary, too.

Q. From Mr. Gilvary, too? Well, let's go back now a little. You say you stepped out forty feet, to the south?

A. I imagine a rough estimate, about that far.

Q. Forty feet to the south; and the third car from the engine?

A. Around that.

Q. The third car from the engine, and about forty feet out?

Mr. Kinder: Oh, no. I object to that question.

Mr. Bernsteen: He said that.

Mr. Kinder: Oh, no.

Mr. Bernsteen: He just said it.

Mr. Kinder: I object to that question as putting into the mouth of the witness——

The Court: The objection is overruled. The witness will take care of himself. Ask him the question. Give him an opportunity to answer.

Mr. Bernsteen: I will withdraw the question.

Q. How many feet out south of the cars were you when you were standing there taking signals?

A. Oh, a rough estimate, it ought to be about, I should judge, thirty-five or forty feet, something like that.

[fol. 168] Q. And where, in relation—at what car or engine were you—south of the engine, or of a car?

A. Well, the engine was pointed this direction (indicating).

Q. I will withdraw that. I will put it again, this way: You were standing forty feet south of the train, of the cut of cars, is that correct?

Mr. Kinder: Object to that. He has not so testified.

Mr. Bernsteen: He did testify.

The Court: No, not south.

The Witness: No.

The Court: Gentlemen, if there is any question about it—how many feet back from the engine were you?

The Witness: How many feet back? Well, let's see: thirty, sixty, ninety—I suppose about 160, something like that—three to four cars—four to five cars back from the engine.

The Court: And how far out from the train?

The Witness: How far out, away from it? Around thirty-five to forty feet.

The Court: Now, you have got it.

Mr. Bernsteen: Just as we said.

Q. Now, did Gilvary give a steady signal with his hand out, at the first movement?

A. Well, I just won't say that he gave a steady signal. As a rule, they most generally do. Now, I can't recall that question, if he really gave a steady signal or not.

Q. All right. Then, did he give a swing-down signal?

A. He gave the signal to stop, when the cars didn't couple.

Q. And they call that a "swing-down," don't they?

A. Yes, sir.

[fol. 169] Q. And then what did he do?

A. What did he do? Why, he stood there for a half a minute, and then he gave a signal to go ahead.

Q. Then he gave a signal to go ahead?

A. Yes, sir.

Q. Tell the Court. And then what did he do?

A. Well, stood in between the cars, I suppose, adjusting these knuckles.

Q. And then what did he do?

A. Well, while he was in there the cars came back at him, I guess—the rear end of the track.

Q. Well, didn't you say that he gave another signal after that?

A. He gave a signal to stop once.

Q. Sure, he gave a signal to stop, once.

A. And then he gave a signal to go ahead.

Q. And then he gave a signal to go ahead?

A. And then he stopped, again.

Q. And another stop signal?

A. Sure.

Q. Sure. That is what I want to know. He gave a stop signal, didn't he?

A. Yes, sir.

Q. And then he gave a go-ahead signal, didn't he?

A. Yes, sir.

Q. And then he gave another stop signal, didn't he?

A. Yes, sir.

Q. What did the last stop signal mean?

A. Last stop signal, he meant to stop.

Q. To keep them there, didn't it? They were stopped, weren't they?

A. Yes, they were stopped.

Q. That meant to keep them there? And after that, he went between the cars again, didn't he? Isn't that correct?

A. Yes, sir.

Q. And then he was hurt, wasn't he?

A. Yes, sir.

Q. And all these signals came directly from Gilvary to you, didn't they?

A. Well, now, get me right on this.

[fol. 170] Q. Let's forget about the switch signal.

Mr. Kinder: Oh, no.

The Witness: Don't forget about these stop signals.

Q. Yes, the stop signal, forget, and the "wash-out" signal. The signal from Mr. Gilvary to "swing down" was from Gilvary to you?

A. Yes, sir.

Q. The signal to pull ahead, Gilvary to you?
A. Yes, sir.
Q. And the last signal, a stop signal, from Gilvary to you?
A. Yes, sir.
Q. Now, each one of those signals you gave to whom?
A. The engineer.
Q. How many signals did you give the engineer?
A. Must have given him three signals.
Q. You gave three signals to the engineer, did you not?
A. During that performance.
Q. Was it on the first attempt, or on the second attempt, that he was hurt?
A. Second.
Q. The second?

Mr. Bernsteen: That's all.

Redirect examination of Chas. Skuce.

By Mr. Kinder:

Q. Mr. Skuce, do you remember this question being asked you at the previous trial: "Where were you, at the time the switch was thrown? Answer: Well, I was off at the side, about twelve feet. There is a little curve, there, and I was at least fifteen feet on the east side of the engine, on the side of the engine, about three cars back from the engine."

[fol. 171] Mr. Bernsteen: Now, your Honor please, he is cross-examining his own witness, and I except, your Honor please.
The Court: Sustained.
Mr. Kinder: Exception.

(Witness excused.)

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Thomas Murtaugh, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Nevison:

Q. Will you state your name, please?
A. Thomas Murtaugh.

Q. What is your occupation, Mr. Murtaugh?

A. Superintendent of the Cuyahoga Valley Railroad.

Q. How long have you been engaged in that capacity?

A. Eight years.

Q. And what railroad experience did you have before that time?

A. Twelve years with the B. & O., ten years with the Wheeling & Lake Erie.

Q. What are your duties with the Cuyahoga Valley Railroad Company?

A. Oversee all the work, placement of cars, and everything pertaining to the railroad.

Q. Are you familiar with the operation of railroad couplers?

A. Yes, sir.

Q. Were you present at the time Mr. Gilvary was injured?

A. No, sir.

Q. When did you learn of that accident?

A. The following morning.

Q. And on the following morning, did you conduct some tests?

A. Yes, sir.

[fol. 172] Q. Of the cars involved in that accident?

A. Yes, sir.

Q. Will you tell the jury just what you did, what those tests consisted of?

A. Well, we took those two cars that were in the accident, took them down on a track opposite the scale, and separated them, tried the operating levers on both ends. I did, myself, personally.

Q. Well, did you attempt to make a coupling with them?

A. Yes, sir.

Q. And what was the result?

A. O. K.

Q. What did you find from your examination of the couplers?

A. Nothing wrong with the couplers at all.

Q. And was any examination made with reference to the side-play in the couplers, the lateral play?

A. Yes, sir.

Q. Did you make that test yourself?

A. Yes, sir.

Q. And what was the result of that test?

A. They were O. K.

Q. How many attempts—that is, upon how many different occasions that morning were these cars coupled and uncoupled, if more than once?

A. I think it was four. I am positive it was four. I tried two on each side, myself, on account of the accident happening, and a man getting hurt on it.

Q. And were there some other people present at the time these tests were made?

A. Yes, sir; the conductor and the crew and assistant yardmaster.

Q. You say you operated the cutting-levers from both sides?

A. From both sides; yes, sir.

Q. And they operated in a good condition?

A. Yes, sir.

[fol. 173] Q. Do you know whether any repairs were made on those cars——

A. Positively, there were no repairs made at all.

Q. Well, let me finish my question—between the time of the accident and the time the tests were made?

A. No, sir.

Q. You say there weren't?

A. None whatever.

Cross-examination of Thomas Murtaugh.

By Mr. Bernsteen:

Q. You are the superintendent?

A. Yes, sir.

Q. The accident happened over here on the——

A. No. 1 scale.

Q. And you made your tests over there?

A. Yes, sir.

Q. The tests were made in the presence of the conductor and crew and assistant yardmaster and yourself?

A. Yes, sir.

Q. Wasn't Robertson there?

A. Yes, Robertson was there.

Q. Sure.

(Witness excused.)

EMIL B. FLIEGER, produced, sworn, and examined by Mr. Nevison, as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Nevison:

Q. What is your name?

A. Emil B. Flieger.

Q. Who do you work for, Mr. Fleiger?

A. Cuyahoga Valley Railroad.

[fol. 174] Q. How long have you been employed by them?

A. Well, I have been a conductor five years.

Q. And what previous railroad experience have you had?

A. Well, had twenty five years, all told. That is, in different departments.

Q. Well, with what railroads?

A. The Erie, the Big Four, the B. & O.

Q. Are you familiar with the operation of railroad couplers?

A. Yes, sir.

Q. Were you present at the time that Mr. Murtaugh conducted some tests on the cars that were involved in the accident which occurred to Mr. Gilvary?

A. Yes, sir.

Q. Will you tell the jury what was done at that time?

A. Well, I was ordered in on No. 1 scales to make a test. I went in there and coupled on with these cars and made a separation—that is, I split the cars, and looked at them, and made three tries. That is, made three couplings.

Q. Well, now, where were you? That is, where were you standing when these tests were made?

A. I was on the side of the engineer, the right side.

Q. I mean, were you right down there—

A. Yes, sir.

Q. —where the cars were coming together?

A. Yes, sir.

Q. And you could observe what happened to the couplers, each time?

A. Yes, sir.

Q. That is, whether they coupled or not? Now, what did you see, there?

A. What did I see?

Q. Yes, what did you see? What happened when the cars were pulled apart and came together again? Did the couplers operate?

A. Yes, sir; they did.

[fol. 175] Mr. Bernsteen: Wait. Your Honor please, object again. He is getting like Mr. Kinder. I object.

The Court: Sustained.

Q. Just tell the jury what you saw there?

A. Well, I split the cars, made the coupling in the ordinary way.

Q. Was that done more than once?

A. Yes, sir; three times.

Q. Who else was present at this time?

A. Will Brechbill, Murtaugh, and Pintner.

Q. Were any tests made that you noted as to the side-play in the couplers?

A. I, I shoved the draw-bars over and looked at them.

Q. What do you say as to that test? What did that reveal to you?

A. Well, it was O. K., to my—O. K.

Q. You actually handled the cutting-levers, yourself, did you?

A. Yes, sir; on both sides.

Cross-examination of Emil B. Flieger.

By Mr. Bernsteen:

Q. Did Mr. Murtaugh make the tests, or you make the tests?

A. I made the tests.

Q. And when did it happen—in the morning, or in the afternoon—these tests?

A. Well, I couldn't say the time. It must have been after dinner.

Q. After dinner, not in the morning?

A. Well, I am not positive.

Q. Well, what trick did you go on, that day?

A. I was working from seven to three.

(Witness excused.)

[fol. 176] W. N. Brechbill, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Nevison:

Q. Will you state your name, please?
A. W. N. Brechbill.
Q. Where do you work, Mr. Brechbill?
A. Cuyahoga Valley railroad.
Q. How long have you worked for them?
A. About four years and a half.
Q. You are employed there at the present time, are you?
A. Yes, sir.
Q. In what capacity?
A. Switchman.
Q. What railroad experience had you had before you came with the Cuyahoga Valley?
A. Well, I worked on the road work for the Pennsylvania railroad from 1898 to 1905. Switched and fired, both, in the machine shop yard for them, from 1905 to 1910, and worked on the B. & O. from 1911 till 1917.
Q. Are you familiar with the operation of railroad couplers?
A. Yes, sir.
Q. Did you take some part in tests which Mr. Murtaugh conducted on the two cars which were involved in the accident that happened to Mr. Gilvary?
A. Yes, sir.
Q. When were those tests made?
R. Right after dinner, some time, the day following the accident.
Q. Now, will you tell the jury what part you took, and what you observed at the time those tests were made?
A. I made a cut on one side of the cars, pulled them apart, coupled them up, and around on the other side, and [fol. 177] cut them on the other side, and pulled them apart, and coupled them up again.
Q. Did anyone else cut the cars, take any part in the actual——
A. Flieger done the same thing and also, I think, Stronsky did, too.

Q. A man by the name of Stronsky there, you say?
A. Yes.
Q. Is he employed by the Cuyahoga Valley at the present time?
A. He is dead.
Q. Did you make any tests of these couplers, as to the side play in them?
A. Yes. We looked at them to see they were all right. They just got the average play.

Cross-examination of W. N. Brechbill.

By Mr. Bernsteen.

Q. How many tests did you make?
A. One on each side.
Q. That is two tests?
A. Yes, sir.
Q. And Stronsky made some tests, too?
A. Yes, sir.
Q. And Flieger made some tests, too?
A. Yes, sir.
Q. And Murtaugh made some tests, too?
A. Yes, sir. I think he did.

(Witness excused.)

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Adolph J. Pintner, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Nevison:

Q. What is your name?
A. Adolph J. Pintner.
Q. Where do you work, Mr. Pintner?
A. Otis Steel Company.
[fol. 178] Q. You are employed by the Cuyahoga Valley Railroad Company, are you?
A. Yes, sir.
Q. How long have you been employed by that company?
A. Eleven years.
Q. In what capacity?
A. Switchman and yardmaster.

Q. And you are at the present time what?

A. Yardmaster.

Q. What previous railroad experience had you had?

A. None.

Q. Are you familiar with the operation of railroad couplers?

A. Yes, sir.

Q. I believe you took some part in tests which were made of two cars that were involved in an accident that happened to Mr. Gilvary?

A. Yes, sir.

Q. When were those tests conducted?

A. After lunch.

Q. On what day, with reference to the time of the accident, if you recall?

A. I don't recollect what day it was.

Q. Just tell what part you took in the tests, and what you saw there at that time.

A. I had the engine going in on No. 1 scale yard, and disconnect and couple two cars that were in the accident, and the couplers worked perfectly each time.

Cross-examination of Adolph J. Pintner.

By Mr. Bernsteen:

Q. How many tests did you make?

A. I was a witness to three or four tests being made. I didn't—none of the handling of the levers, myself.

[fol. 179] Q. Who made the tests? Did Murtaugh make any?

A. No, sir.

Q. All the men made tests, didn't they, on the scale track?

A. Yes, sir.

Q. In the afternoon?

A. Yes, sir.

(Witness excused.)

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Fred T. Robertson, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Your name is what?

A. Fred T. Robertson.

Q. Fred T. Robertson?

A. Yes, sir.

Q. And you are connected with the Otis Steel Company, Mr. Robertson?

A. Yes, sir.

Q. And also with the Cuyahoga Valley?

A. Yes, sir.

Q. And what is your position there?

A. I am employment manager for the Otis Steel Company, and the employment manager and claim agent of the Cuyahoga Valley railroad.

Q. Now, did you have any part in having photographs taken of the two cars that were involved in Mr. Gilvary's accident?

A. Yes, sir.

Q. And when were these pictures taken, or when were the photographs taken?

A. Some were taken the morning following the accident, and the others were taken shortly after, after noon, the following day—shortly after noon.

Q. Now, I will hand you—did you personally take the pictures? I mean, yourself?

A. No, sir.

[fol. 180] Q. Were you present when they were taken?

A. Yes, sir.

Q. I want to hand you a photograph which has been marked Defendant's Exhibit 5, and ask you to state of what that is a picture?

A. That is a picture showing the west track of the blooming mill, and also the east track, and the cars that were involved in the accident, at about the point where the accident happened.

Q. Now, do I understand that these two cars that are down here on this, what is marked east track, were the two cars that were involved in the accident?

A. Yes, sir.

Q. And what is the fact with respect to their location, as shown in the picture, so far as the location of the cars, at the time of the accident?

A. They were in about the same position as the cars were at the time of the accident.

Q. I will ask you whether or not the lumber and the pile, here, that is shown on the left of this picture, was there on the morning after this accident?

A. Yes, sir.

Mr. Kinder: We offer Defendant's Exhibit 5 in evidence, if the Court please.

(Defendant's Exhibit 5, so offered in evidence, is hereto attached and made a part hereof.)

Q. Now, I will hand you a picture which is marked Defendant's Exhibit 6, and ask you to state of what that is a photograph?

A. That is a picture of the B. & O. gondola and a "Pee-Mickey" hopper car, taken at the point of the accident, showing the couplers.

Q. State whether or not the cars were coupled at that time?

A. The cars were coupled at that time.

[fol. 181] Q. When was that picture taken?

A. In the morning after the accident.

Q. Approximately about what time in the morning, do you remember?

A. I believe between nine and ten o'clock.

Q. Was that picture—and that is Defendant's Exhibit 6—taken approximately the same time as Defendant's Exhibit 5?

A. Yes, sir.

Q. Now, I will hand you Defendant's Exhibit 7, and ask you to state of what that is a photograph?

A. That is a picture of the B. & O. car, taken at the scale track, after these running tests had been made.

Q. And Defendant's Exhibit 8 is what?

A. Picture of the "Pee-Mickey" car, taken—of the coupler on the "Pee-Mickey" car, taken after the running tests had been made, the following day.

Q. And when were these running tests made, do you recall?

A. Shortly after the lunch hour of the day following the accident.

Mr. Kinder: I desire to offer Defendant's Exhibits 5, 6, 7, and 8 in evidence, and ask to hand them to the jury.

The Court: Counsel——

Mr. Bernsteen: Sure.

The Court: Plaintiff's Counsel has seen them? I say, you have seen them?

Mr. Bernsteen: Oh, I am not objecting to them.

Mr. Kinder: You have seen the pictures?

Mr. Bernsteen: No. Let me look at them.

Mr. Kinder: Well, they are the same ones that were here before.

Mr. Bernsteen: I saw this one.

The Court: They may be admitted.

[fol. 182] (Defendant's Exhibits 5, 6, 7, and 8, so offered and received in evidence, are hereto attached and made part hereof.)

Cross-examination of Fred T. Robertson.

By Mr. Bernsteen:

Q. You were right there when the tests were made, were you not?

A. Yes, sir.

Q. And they were made in the afternoon, weren't they?

A. I believe it was about one o'clock.

Q. And you are the claim agent, aren't you?

A. Yes, sir.

Q. And you also hire the men, don't you?

A. Yes, sir.

(Witness excused.)

Mr. Kinder: I should like to offer in evidence Defendant's Exhibit 3, which I neglected to do in connection with the examination of——

Mr. Bernsteen: I object to it, your Honor.

Mr. Kinder: That is the report of the car inspector, Mr. Bawolak.

The Court: Objection sustained.

Mr. Kinder: Exception, and I would like to have this constitute our offer of proof.

The Court: It may be offered.

Mr. Kinder: When I say "this," I mean I should like to have this Defendant's Exhibit 3, our offer to prove.

(Defendant's Exhibit 3, so offered and excluded from the evidence, over the exception of the defendant, is attached hereto and made a part hereof, for purposes of reference, and as constituting the offer of proof of the defendant.)

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[fol. 183] Ralph Wagar, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Your name is what?
A. Ralph Wagar.
Q. How do you spell it?
A. W-a-g-a-r.
Q. And you live in Cleveland?
A. Cleveland Heights.
Q. Are you connected with the Otis Steel Company?
A. Yes, sir.
Q. In what capacity, Mr. Wagar?
A. Draftsman.
Q. Now, I want to ask you whether or not, at the request of the defendant here, you determined the degree of curve of the track known as the "east track" in the slab yards?
A. Yes, sir.
Q. Did you do that? And did you, in determining that degree of curve, prepare a map, showing the track?
A. I did.
Q. Now, I want to hand you Defendant's Exhibit 4, and ask you whether or not that is the map of the track?
A. It is.
Q. Now, will you tell me, or tell the jury, rather, what the degree of curvature is, of the east track, after it comes off of the west track?
A. May I have the map?
Q. Certainly (handing map to the witness).
A. It is a ten-degree curve.
Q. It is a ten-degree curve?

A. Yes, sir.

Q. Now, going back up to the switch point, where the east track runs into the west track, is there also a curve there in the track as it comes off the west track?

A. There is a curve; yes.

[fol. 184] Q. And what is the degree of that curve?

A. The degree is twenty degrees forty five minutes.

Q. Now, by the way, I don't know whether you did or not: did you determine the degree of the curve of the west track shortly after it leaves this running track switch?

A. No.

Q. You didn't do that? Did you make this map? (Deft. Ex. 1.)

A. I did not; no.

Q. Did you have anything to do with making it?

A. The original? No.

Cross-examination of Ralph Wagar.

By Mr. Bernsteen:

Q. Who made the original map?

A. It was made by a draftsman of the Otis Steel Company, before my time of working for them.

Q. Is he still there?

A. How's that?

Q. Is that man still working for the Otis Steel?

A. I can't say. I don't know just who made it. Perhaps the initials may be on the map, there.

Q. Did you make this map (Referring to Defendant's Exhibit 4)?

A. I did.

Q. And you determined these degrees of curvature, yourself?

A. Yes, sir, with the help of H. C. Miller, who was the field engineer.

Q. Well, who did the work, you or Mr. Miller?

A. Mr. Miller found the degrees, and so forth, with his instruments, in the field.

Q. Well, you just took it from—you took the figures from Mr. Miller?

A. That is correct. I took his figures—his field figures. [fol. 185] Q. Well, where did he give them to you? In your office?

A. Yes, sir.

Q. He went out in the yard and got the figures and gave them to you, did he?

A. That is correct.

Q. You, yourself, didn't get the figures?

A. I didn't get them. I was out there, but I didn't get the figures.

Q. That is a 10-degree curve down here, isn't it, where you said to Mr.——

A. Yes.

Redirect examination of Ralph Wagar.

By Mr. Kinder:

Q. Well, let me ask you this: you went out there on the ground, when Mr.—what did you say his name was?

A. Miller.

Q. —Miller used his transit instruments?

A. No, I wasn't there at the time. I was there before he took, looked the ground over.

Q. Then, as I understand it, you took the figures that Mr. Miller—the figures that he acquired in his survey, and computed the degree of curve, and plotted it on this Exhibit 4, is that correct?

A. Yes, sir.

Mr. Kinder: We offer Defendant's Exhibit 4 in evidence.

Mr. Bernsteen: No objection to that.

(Defendant's Exhibit 4, so offered and received in evidence, is hereto attached and made part hereof.)

Recross-examination of Ralph Wagar.

By Mr. Bernsteen:

Q. At least, as far as you know, this is only correct if Mr. Miller's figures are correct?

A. Yes, sir.

(Witness excused.)

[fol. 186] Mr. Bernsteen: Your Honor please, to avoid delay, I will admit Mr. Miller's figures are correct.

The Court: Very well, Gentlemen.

Mr. Kinder: Well, I have just arranged to get Mr. Miller here.

The Court: He has already admitted——

Mr. Bernsteen: I will admit that they are correct.

Mr. Kinder: Now, one other thing, Max. I don't want to ask any favors from you. This map (referring to Defendant's Exhibit 1) was introduced, before.

Mr. Bernsteen: Let it go in. No objection.

Mr. Kinder: And I understand that the map may go in without further engineering proof, and we can agree that the map scale—which ought to be agreed on——

The Court: Is it stated on the map?

Mr. Bernsteen: Says so—one inch to sixty feet, isn't it?

Mr. Kinder: That is what I was looking for.

Mr. Bernsteen: Down at the bottom, here.

Mr. Kinder: Yes—"Scale, one inch to sixty feet." And we offer, therefore offer this in evidence, marked Defendant's Exhibit 1.

The Court: Call it "the large map."

(Defendant's Exhibit 1, so offered and received in evidence, is hereto attached and made a part hereof.)

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Mr. Kinder: Now, with respect to this testimony here, if Mr. Bernstein will consent, I will agree to read the testimony of the witnesses.

Mr. Bernsteen: All right.

Mr. Kinder: Instead of waiting till afternoon.

Mr. Bernsteen: All right.

Mr. Kinder: At the previous trial. Is that all right?

[fol. 187] Mr. Bernsteen: Go ahead.

The Court: Well, let the record show that the witnesses named, as will be stated, if personally present in court would testify as his testimony on the former case may be read to the jury. Put the cross examination, in, too, Mr.——

Mr. Kinder: Yes.

Mr. Bernsteen: Yes, read it all.

The Court: Very well.

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Thereupon, by consent of Court and Counsel, the Defendant offered in evidence and read to the jury, on behalf of the Defendant, the testimony of Thomas Fitzgerald, E. O. Kerr, and A. H. Gensley, given upon the former trial of said

cause; said testimony, so offered in evidence and read to the jury, being in the words and figures following, viz.:

"THOMAS FITZGERALD, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Your name is what?

A. Thomas Fitzgerald.

Q. And you live in Cleveland, Mr. Fitzgerald?

A. 3505 Library Avenue.

Q. And what is your business?

A. Terminal trainmaster for the Erie railroad.

Q. How long have you been with the Erie railroad?

A. Forty-four years.

Q. During that time you have served, I suppose, as a brakeman, conductor, yardmaster?

A. In the transportation department, the whole time.

[fol. 188] Q. And, by reason of your employment, are you familiar with couplers and coupling operations, are you not?

A. Yes, sir. I have been familiar with them all my life.

Q. I want to get your opinion on the following facts: a coupling operation is intended between a hopper car, which is attached to a cut of five or six cars, and an engine, and being moved in a southerly direction on and into the siding, with a 'Pee-Mickey' hopper car; the car that is being moved in is a gondola, rather, and the car on which the coupling is intended is a 'Pee-Mickey' hopper car; both of the cars being 40-foot or over, variously estimated at 40 to 45 feet; the speed of the train at which the cars are being backed in on this siding, variously estimated at from two to four miles an hour; a slight grade in the track towards the north, or in the direction from which the movement is being made, and the coupling is attempted on a curve of ten degrees. The facts indicate that the draw-bars on both of these cars had a permissible play in the housing of not to exceed four inches. The knuckle on the Baltimore & Ohio gondola was closed. The knuckle on the 'Pee-Mickey' car, the standing car, was open. The draw-bar of neither car had been adjusted properly to the attempt to couple. What do you say,

as a railroad man, whether or not the failure of the cars to couple—which happened—is any indication of the fact that either or both of those couplers were defective?

A. Well, the length of the car has got a whole lot to do with making a coupling on a curve, and, due to the fact that you have two 40 foot cars there, would hardly make any difference; but you do have a difficult time in coupling cars on a curve. Now, that is for several reasons.

[fol. 189] Mr. Bernsteen: Your Honor please, may we get an answer?

The Court: Just a minute. Read the question.

(The latter part of the hypothetical question was thereupon read.)

A. No. I would say no.

Mr. Kinder: That is all.

Mr. Bernsteen: That is all.

Mr. Kinder: Now, just a moment.

Q. Why?

A. Well, you have cases where cars on a curve will not couple at all times, but that don't—that is not near—due merely to the fact that the car might be out of order, or a defective car. Now, if it was on a straight track, you would have a better chance, or an old car. Now, you take, we have got cars that we have got 33 degrees curvatures, that we can make a coupling on, with an old car, but a new car, we can't.

Mr. Bernsteen: Your Honor please——

Mr. Kinder: That is all.

(Witness excused.)"

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"E. O. Kerr, produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Will you state your name, please?

A. E. O. Kerr.

Q. And you live in the city, Mr. Kerr?

A. Yes, sir.

Q. And are connected with what railroad company?

A. The New York, Chicago & St. Louis—Nickel Plate Railroad.

[fol. 190] Q. Known as the Nickel Plate Railroad?

A. Yes, sir.

Q. What is your position with them?

A. Yardmaster, at the present time.

Q. And how long have you been in the railroad business?

A. Well, 32 years.

Q. And how long have you been with the Nickel Plate?

A. Twenty-four.

Q. During that time, you have been employed on the railroads in connection with the movement of cars, as switchman, conductor, and yardmaster, is that correct?

A. Yes, sir; up to the present date.

Q. You, of course, are familiar with couplers and coupling operations?

A. Yes, quite. I have had a lot of experience with them.

Q. Now, Mr. Kerr, what is the effect of curves on a coupling operation—two cars which are coupled on or near the curve?

A. Well, sir, the effects of a curve coupling——

Mr. Bernsteen: Your Honor please, I think the man ought to be told what kind of a curve.

The Court: He may answer.

Q. Just put it on a 10-degree curve.

A. Ten-degree curve? What size cars do you want—forty, or thirty-six?

Q. Well, we will say forty-foot cars.

A. On a ten-degree curve, with two forty-foot cars, you can couple with one knuckle closed, and one open, providing they are pulled over to the extreme side.

Q. Now, when you say 'providing they are pulled over to the extreme side,' what do you mean by that?

A. Either pulled to the east or west. Now, if you want to couple the car you are coupling onto, on this track, the [fol. 191] knuckle on that car is over here (illustrating)—you want to pull that over, and pull the other knuckle over, so that when they enter, the pin will drop.

Q. That is to say that there is certain side-play in the draw-bars of a coupler, isn't there?

A. Yes, sir.

Q. What is the permissible side-play, if you know?

A. When they are built, they are built from three and one half to four inches, but that is not a safety rule nor any standard thing. That is just for going around curves.

Q. The play is put in them, so as to accommodate the couplers to curves, is it? Now, do I understand that that ten-degree curve, the couplers—the draw-bars have to be pulled over?

A. Before you get the pin to drop, they will have to be pulled over.

Q. And the play—when you say three to four inches, you mean the play of the draw-bar back in the housing?

A. Can I stand down there?

Q. No, you know what I mean when I talk about a housing?

A. You mean the two—two wood blocks you have got there?

Q. Yes.

A. Yes.

Q. This, you mean to say, will be three inches back here?

A. Three and a half to four. That is the way they are built.

Q. Of course, that means that the end of the draw-bar swings more, don't it?

A. Well, it would. You have got seventeen inches to go on—whatever that would figure out to be—about two and a half or three inches.

Q. So that, at a coupler, you say you have a permissible play of three and one-half to four inches. At the end of the coupler, there is going to be a wider arc, there?

[fol. 192] Cross-examination of E. O. Kerr.

By Mr. Bernsteen:

Q. How did you happen to come here this morning?

A. Why, Mr. Kimber called me.

Q. Who?

A. Kimber.

Q. Mr. Kinder?

A. Yes, sir.

Q. That is the first you knew about it?

A. No, sir. I have met him once before.

Q. In what manner?

A. I was called up to his office as an expert coupler—that is, in my service in railroading, and he wanted a little information, and I gave it to him.

Q. An expert coupler?

A. Yes, sir. That is——

Q. For the Nickel Plate?

A. I say, for the length I have been in the service, and the curves we have on our railroad.

Q. And you consider a ten-degree curve much of a curve?

A. It isn't so bad, no. At least, we don't consider it bad.

Q. It is a slight curve, isn't it?

A. Well, it isn't slight. A three-degree curve is what a main-track curve consists of.

Q. And what is a ten-degree curve, you say?

A. The three-degree consists—is the main-track curve. That is what they put on the main track, but a ten-degree curve is not a bad curve.

Q. Most curves are more than that, aren't they?

A. Yes, sir. We have some thirty.

Q. Well, men don't pay much attention to ten-degree curves, do they, in their work?

A. We pay attention to it at all times, at the present date.

Q. You do?

A. Yes, sir.

[fol. 193] Q. Why?

A. Because we don't want to break the air-hoses on the cars, and that causes delay to them.

Q. That is the reason—not on account of coupling, though, is it?

A. Yes, sir. When you overcome damage, you pay attention to coupling.

Q. How should couplers work?

A. How should they work?

Q. Yes.

A. Well, sir, to make a proper coupling, they should both be open in centers.

Q. Both be open?

A. Yes, sir.

Q. Not one?

A. How?

Q. Not one?

A. Not if you want to make an assured thing of it.

Q. And both must be open? All right. How do they work, I want to know?

A. They work automatically.

Q. And what do you mean by that?

A. Why, the biggest part of the coupling is, when you open the lever, pull the lever, they will come open themselves.

Q. That is the way, when you are on the outside of it?

A. Yes, sir. When you are on the outside.

Q. You have to open from the lever?

A. The biggest part of them. I won't say all of them.

Q. And why does the lever extend on the outside?

A. So that you shall not go between the cars and pinch your fingers.

Q. And that was the purpose of the law, wasn't it, the Safety Appliance Act?

A. Yes, sir; it is.

Q. That is all.

A. And the clearance is one and one-half inch.

(Witness excused.)"

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[fol. 194] "A. H. GENSLEY; produced, sworn, and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Kinder:

Q. Your name is A. H. Gensley?

A. Yes, sir.

Q. G-e-n-s-l-e-y?

A. Yes, sir.

Q. You live here in the city, do you, Mr. Gensley?

A. Yes, sir.

Q. Employed by the Baltimore & Ohio Railroad?

A. Yes, sir.

Q. And what is your position here?

A. Terminal trainmaster.

Q. Terminal trainmaster?

A. Yes, sir.

Q. As terminal trainmaster, what does that mean—what are your duties?

A. Well, it is a supervisor over different departments, especially the transportation department.

Q. In the Cleveland Terminal?

A. In the Cleveland Terminal, yes.

Q. How long have you been with the Baltimore & Ohio?

A. Twenty-five years.

Q. And employed by that road during that time as switchman, conductor, and yardmaster?

A. Yes, sir.

Q. You are now terminal trainmaster?

A. Yes, sir.

Q. And familiar, I assume, with coupling operations and couplers; are you not?

A. Yes, sir.

Q. Take the ordinary type coupler, you tell me what the general dimensions of the coupler are, first. I am speaking, now, about a coupling end as distinguished from the draw-bar. First, the height of a coupler.

A. Well, they run different sizes, from 5 x 5 to 6 x 8.

Q. Inches you mean?

A. Yes, inches.

[fol. 195] Q. That is, they run from 5 x 5, up and down?

A. No, that is the shank of your draw-bar, that I am speaking of.

Q. Oh, you are speaking about this part of the coupler (indicating)?

A. Yes, sir.

Q. Back in the draw-bar?

A. Yes, sir.

Q. Now, about the head of the coupler, about, roughly, what are the dimensions of the head of the coupler?

A. Well, they vary from, I presume, around ten to sixteen inches.

Q. Now, the width of the face of the coupler—about the same, is it?

A. Approximately the same.

Q. That is, couplers vary in size, dependent upon the kind of coupler it is, I suppose—the particular coupler, or the kind of coupler? Is that right?

A. The newer type of couplers are larger than they were, of course, a few years back, and the equipment is smaller.

Q. That doesn't mean, however, that the new type coupler won't couple with an old type coupler, providing they are in proper condition, does it?

A. Oh, no, no. They work very satisfactory.

Q. That is, the mechanism is the same, regardless of size?

A. Mechanism is exactly the same.

Q. Now, Mr. Gensley, assuming the attempted coupling operation between a Baltimore & Ohio gondola of the 150,000 class, which was on the end of a cut of five or six cars, being backed by locomotives, in on a siding, and that it was intended to couple that car, or that cut of cars, or, rather, that car, to a car standing on the track, known as a 'Pee-Mickey' car, which was a hopper; the train being moved in on that track at the rate of speed variously estimated at two to three miles an hour, and that both the 'Pee-[fol. 196] Mickey' car and the Baltimore & Ohio car were approximately 40-foot cars—some witnesses say forty-five foot—between forty and forty-five feet; and that, in moving down this track, and at the point of contact, the track was on a ten-degree curve, the movement being made in a southerly direction, and the outside of the curve on the east side of the track; the track, itself, being slightly downgrade towards the north—that is, toward the direction from which the movement was made; the knuckle on the Baltimore & Ohio car being closed, and the knuckle of the coupler on the 'Pee-Mickey' car being open; what would you say as to whether or not, under those circumstances, in view of the curve and the grade and the condition of the knuckles, whether or not the fact that the coupling did not make, would indicate that either or both couplers were defective?

A. No, that would not indicate the couplers were defective.

Q. Why not?

A. Why, you had a curve, there, and it is necessary to line your draw-bars, as they are called in railroad terms, in certain positions, so they will come together, so the knuckles will come together, and not——

Q. It is necessary, as I understand it, for the draw-bars to have a certain play, in the draw-bar housing, isn't it?

A. They run from two and a half to four inches, depending on the length of your cars. Longer car has more play,

from the fact that it is permitted to operate around the curves.

Q. That is, the railroads have increased the length of their equipment, and in doing that, in order to accommodate the draw-bar to the curves that you encounter, you have to have more play in there?

A. Yes, sir.

[fol. 197] Q. The longer the car, the more play it takes to get around the curve?

A. Yes, sir.

Q. Now, I forgot to incorporate in my question, of course, that the draw-bars on these cars had an extent of side-play, as you call it, of within a limit of four inches. Does that make any difference in your answer?

A. I didn't quite get the question.

Q. Maybe you misunderstood me. You said, in answer to the question I put to you, the fact that the couplers failed to make, would not be any indication that either or both the couplers were defective, didn't you?

A. Yes, sir.

Q. Now, let me ask you again. I think I did. Why is that?

A. Why is the side-play?

Q. No, what is that—what is the reason for that answer that that does not indicate that they are defective?

A. Why, simply because of the possibility that the couplers are not properly lined, so that they will enter each other on the curve.

Q. That is to say, a coupler—a draw-bar has to be adjusted to a particular curve on which a coupling is attempted?

A. Yes, sir.

Q. And the permissible play in the draw-bar is from two and a half to four inches, dependent on the size of the car, is that right?

A. Yes, sir.

Cross-examination of A. H. Gensley.

By Mr. Bernsteen:

Q. And, to adjust, the man would have to go between the ends of the cars, wouldn't he?

A. He would have to do what?

Q. And to adjust, the man would have to go between the ends of the cars, wouldn't he, either by arm or some part of his body, isn't that correct?

A. Yes.

[fol. 198] Q. Sure.

A. Yes.

Q. And you are familiar with the Safety Appliance Act, are you not?

A. I think I am fairly familiar, yes.

Q. Yes, and doesn't that say that they should so work that there will be no necessity for men to go between the ends of cars?

A. Not to my knowledge.

Q. May I read it to you? To familiarize—you are trainmaster or superintendent out there?

A. Trainmaster.

Q. And how long have you been with the B. & O.?

A. Twenty-five years.

(Objection. Objection sustained.)

Q. Well, suppose they are both properly lined up, should they couple by impact, automatically, if one coupler is open?

A. On a curve?

Q. If they are properly lined up on a curve.

A. Depends on the degree of curve and the impact.

Q. A ten-degree curve, and an impact, and the properly lined-up, and the couplers open, should they couple if both couplers are in proper shape?

A. Yes, they should couple.

Redirect examination of A. H. Gensley.

By Mr. Kinder:

Q. It is the business of a brakeman, is it not—the rear brakeman, who has charge of a coupling operation, to see to it that his draw-bars are properly lined, before he gives the signal for the movement of the train, of the coupling operation, isn't it?

A. Yes, sir.

[fol. 199] Recross-examination of A. H. Gensley.

By Mr. Bernsteen:

Q. By the way, Mr. Kinder is attorney for the B. & O., isn't he?

Mr. Kinder: I will concede that, if there is any question about it.

Q. That is right, isn't it?

A. He is our Counsel, I understand.

Q. And you have testified in courts for Mr. Kinder before, haven't you?

A. Various times.

Q. Various times?

Redirect examination of A. H. Gensley.

By Mr. Kinder:

Q. Would the mere fact that you are employed by the Baltimore & Ohio Railroad Company—and I happen to represent it—change your testimony from the truth?

A. Absolutely not.

(Witness excused.)

Mr. Kinder: Now, if your Honor please, I want to offer—where is that stipulation? I desire now to offer in evidence——

Mr. Bernsteen: Now, your Honor please, that stipulation has been already offered and objected to, and the Court has ruled it out, in the opening statement.

Mr. Kinder: I don't know of anything that has been ruled out here.

Mr. Bernsteen: Oh, yes, it has.

The Court: I don't know what you are referring to.

Mr. Kinder: Well, I am referring—possibly this is a matter which should be discussed in the absence of the [fol. 200] jury—but I am referring to the conceded facts with respect to the matter which we, by agreement, incorporated in my opening statement, which, of course, it wasn't as a matter of fact incorporated in it. It relates to that matter that we discussed on the motion at the end of the opening statement. Here it is.

The Court: That is after the jury had retired?

Mr. Kinder: Yes. (Hands transcript of "stipulation" referred to, to the Court.)

(Whereupon the Jury was excused until 1:15 o'clock P. M.)

Mr. Kinder: Defendant offers——

The Court: In defense, now?

Mr. Kinder: In defense—part of the defense—the following conceded facts, or the following facts which are conceded by the plaintiff: "On and prior to the date of the accident to the plaintiff, the defendant, the Cuyahoga Valley Railway Company, had complied with the so-called Workmen's Compensation Law of the State of Ohio. Two."——

(Interruption.)

Mr. Kinder: Do you want to enter a separate objection to these separate facts, or enter an objection——

Mr. Bernsteen: I will enter an objection to each one.

The Court: Let him make his objection collectively and separately, and severally, after you have stated it.

Mr. Kinder: All right. (Reading:) "That there was on file with the Industrial Commission of Ohio, an agreement known as the Acceptance and Notice of Election by Employer and Employees, under Section 51 of the Workmen's Compensation Act, signed by the plaintiff"——

[fol. 201] Mr. Bernsteen: No—"with the signatures of the plaintiff upon the same."

Mr. Kinder: How?

Mr. Bernsteen: "With the signature of plaintiff upon same."

Mr. Kinder: That is what it will be. This is going to be a part of my offer of proof. It is referred to, down here. (Continuing)—"signed by the plaintiff, John Gilvary, and by the employer, the Cuyahoga Valley Railway Company. Three. That such agreement, known as the Acceptance and Notice of Election, etc., above referred to, had been filed with and approved by the State Liability Board of Awards, now known as the Industrial Commission of Ohio. Four. That Defendant's Exhibit 2"—which is here proffered—"is a true and correct copy of the agreement above referred to."

Mr. Bernsteen: I object, your Honor please, to the offer.

Mr. Kinder: In my offer, I want to read those facts, and I am offering those to be read to the jury.

The Court: Now, then, I understand the plaintiff doesn't object because of the truth of the statements, but he objects to its materiality?

Mr. Bernsteen: Correct, your Honor please.

The Court: Now then, so you may have your record complete, the statement, as read, is the offer made? And the plaintiff concedes the truthfulness of the statement, but objects to its materiality—to its offer and its materiality in this case for any purpose?

Mr. Bernsteen: That is right, your Honor please.

The Court: Now, the objection of the plaintiff is sustained, and the defendant is given an exception.

(To which ruling of the Court the defendant, by its Counsel, then and there duly excepted.)

[fol. 202] Mr. Kinder: And, out of an abundance of caution, I ask to have the statement read constitute our offer to prove the facts as therein contained.

The Court: Well, those are admitted facts. You may make your record any way you please. You can have the plaintiff admit that those facts, as stated, are true, but still objects, as to the materiality.

Mr. Bernsteen: Yes, your Honor please.

Mr. Kinder: All right, have that, then, your Honor please—the plaintiff concedes the truthfulness, that the facts read here are true, and we take our exception to the refusal of the Court to——

The Court: —admit it.

Mr. Kinder: —admit it. I don't suppose there is any necessity of the proffer.

(Defendant's Exhibit 2, proffered by the defendant in connection with the foregoing offer, is, merely for the purpose of reference, attached hereto and made a part hereof.)

Thereupon the defendant rested.

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Thereupon the plaintiff, further to maintain the issues on his part to be maintained, offered the following evidence in rebuttal:

PLAINTIFF'S REBUTTAL

JOHN L. GILVARY, the plaintiff, heretofore produced, sworn, and examined, in chief, being recalled in rebuttal, testified further as follows:

Redirect examination.

By Mr. Bernsteen:

Q. Mr. Gilvary, you remember a year ago last summer that Mr. Melvin and his family were at your home?

A. Yes, sir.

[fol. 203] Q. Had dinner there?

A. Yes, sir.

Q. And you remember that you and Mr. Melvin were on the porch, afterwards?

A. Yes, sir.

Q. And did Mr. Melvin say to you at that time he didn't know whether it was the first or the second attempt, that you were injured?

Mr. Kinder: Object to it.

A. He told me that was the report——

The Court: Wait a moment. What is the ground of your objection?

Mr. Kinder: Immaterial.

The Court: Oh, no. It is relevant. It may be received by the jury for one purpose only, which the Court now instructs the jury, and that is, as affecting the credibility of the witness, if it does.

(Defendant excepts.)

Q. Did he make that statement?

A. Yes, sir.

Q. Do you remember, two or three months ago, Mr. Melvin called you up by telephone?

A. Yes, sir.

Q. And you met him over at his rooming house?

A. Yes, sir.

Q. And did he say to you at that time that he couldn't see you any more, on account of his job.

Mr. Kinder: Object to that.

A. Yes, sir.

The Court: Overruled. It will be received for the same purpose only?

(Defendant excepts.)
(Witness excused.)
The plaintiff rests.

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[fol. 204] The foregoing, together with the exhibits hereto attached and made a part hereof, comprises all of the evidence offered and received upon the trial of said cause.

REQUEST THAT SECOND AND THIRD DEFENSES BE WITHDRAWN

Mr. Bernsteen: Now, I ask the Court that the second and third defenses be withdrawn by the defendant from the consideration of the jury.

The Court: And the jury so instructed, I presume?

Mr. Bernsteen: Yes, and the jury so instructed.

Mr. Herman Toll: The defendant rests? Shall we show that?

Mr. Kinder: The defendant has rested, now.

The Court: So has the plaintiff?

Mr. Kinder: Yes.

The Court: And the rebuttal follows, Mr. Toll.

Mr. Kinder: You haven't prepared a written request before argument?

The Court: Now, your last request—read it.

(Thereupon, the reporter, Mr. Toll, read Mr. Bernsteen's request as follows: "Now, I ask the Court that the second and third defenses be withdrawn by the defendant from the consideration of the jury.")

The Court: In the Court's charge, that will be done.

Mr. Kinder: Now, I understand that to mean that this view—in view of your intended withdrawal in your general charge——

The Court: That is right.

Mr. Kinder: —that that is not to be made the subject of comment at any time during the argument, and I will so govern myself.

[fol. 205] The Court: Well, that is pretty hard for the Court to tell you what your argument should be.

Mr. Kinder: Well, I mean, I don't want to be guilty of bad manners

The Court: No indication of what the Court will do.

Mr. Kinder: Ordinarily, it would come up in a request to charge before argument, and it would be determined then.

The Court: In this case I will say to you this: in this case I will conceive it the Court's duty, because of the opening statements of both Counsel, the plaintiff and the defendant, as your issues were when we started this case, and then later withdrawing of them, that the Court should tell this jury as to the second and as to the third defense, why they are out of the case. The Court will assume that responsibility.

Mr. Bernsteen: All right.

Mr. Kinder: Right along that line, I am going to request the Court to instruct the jury that, in substance—later on I will have it in appropriate form—that a verdict in favor of the defendant in this case will not deprive him of his rights under the Compensation Law.

Mr. Bernsteen: I object to that, your Honor please. I will absolutely object to it.

The Court: Well, you may make your request, and I will deal with that when I get it.

Mr. Kinder: I want to put that in as a general—now, I have submitted some requests to charge, with the authorities in support of them.

[fol. 206] (Thereupon the defendant submitted to the Court eight written requests for charge before argument, as follows):

"Now comes the defendant and in writing moves that the Court give to the jury, before argument, the following requests, not as a series but as separate requests.

(Signed) Tolles, Hogsett & Ginn, Attorneys for Defendant.

"Defendant's Requests to Charge

I

"The plaintiff, in his petition, has charged the defendant with negligence in moving the train while the plaintiff

was between the cars. This claim has been withdrawn, and I instruct you to disregard this assignment of negligence."

II

"Plaintiff claims, in his petition, that the defendant was negligent in failing to warn him of its purpose to start the train in movement. This claim has been withdrawn by the plaintiff and you will disregard this assignment of negligence."

III

"Plaintiff claims, in his petition, that the defendant was negligent in failing to keep the train at a standstill until the plaintiff had given a signal for the movement of the same. This claim has been withdrawn by the plaintiff, and you will disregard this assignment of negligence."

[fol. 207]

IV

"Plaintiff claims, in his petition, that defendant was negligent in starting the train and in moving the same without any signal being given for the movement of the train. This claim has been withdrawn by the plaintiff, and you will disregard this assignment of negligence."

V

"I instruct you that I am submitting to you, so far as any claim of negligence on the part of the defendant is concerned, solely the question whether or not the couplers on the Baltimore & Ohio and P., McK. and Y. cars, or either of them, were defective. In other words, unless the plaintiff has established, by the greater weight of the evidence, that either or both of these couplers were defective, the plaintiff cannot recover in this action, and your verdict must be in favor of the defendant."

VI

"I say to you as a matter of law that the fact that these Baltimore & Ohio and P., McK. & Y. cars failed to couple does not necessarily establish that either or both of the couplers were defective, and you must consider all of the surrounding circumstances, including the curve or curves of the track, the grade thereof, the length of the cars and

the fact that there is necessarily a permissible amount of side-play in the draw-bars. Hence, if you find that the failure of these two cars to couple was solely due to the curve, the grade of the track and the non-alignment of the draw-bars, due to a permissible side-play thereof, or that such failure was solely due to any, or any combination, of said causes, the plaintiff cannot recover here, and your verdict will be in favor of the Cuyahoga Valley Railway Company."

[fol. 208] VII

"I instruct you that side-play in a coupler, according to a standard in general and accepted use on railroads, does not constitute a defect in the coupler, and unless you find by a greater weight of the evidence that there was in one or both of the couplers involved in this case greater side-play than was necessary to bring about, when properly operated and given a fair trial, the automatic coupling of the cars by impact, then I say to you, as a matter of law, that neither of these couplers can be found by you to be defective in that regard. Hence I say that if, by the greater weight of the evidence, you shall find that a failure of these two cars to couple was solely due to a curve of the track and the permissible side-play of the couplers, as I have just defined it to you, or either one of these conditions, your verdict will be in favor of the Cuyahoga Valley Railway Company."

VIII

"I instruct you that before the plaintiff is entitled to recover against the defendant in this case, he must not only establish by a greater weight of the evidence that one or both of these couplers were defective, but he must further establish that the proximate cause of his accident, as I shall define 'proximate cause', was a defective condition in one or both of these couplers. Hence, if you find that the proximate cause of this accident, as I shall define that term to you, was the movement of this train, whether by the engineer, without a signal from the plaintiff, or otherwise, your verdict will be in favor of the Railway Company, even if you find by the greater weight of the evidence that one or both of these couplers were defective."

[fol. 209] Mr. Bernsteen: Were they exactly the same as last time, or different?

Mr. Kinder: Yes, the same thing.

Mr. Bernsteen: Same as last time?

Mr. Kinder: First four requests deal with assignments of negligence which Mr. Bernsteen withdrew, but which I want to have before argument taken out of the case by the Court.

The Court: Let's see what they are. We can thresh them out pretty quick.

Mr. Kinder: And have the record show that this is a model. Before, we submitted it.

Mr. Bernsteen: Yes.

(Counsel for defendant thereupon offered in evidence, as Defendant's Exhibit A, a certain model which is attached hereto and made a part hereof.)

The Court: Are these similar requests, that were made?

Mr. Bernsteen: Exactly the same requests, your Honor.

Mr. Kinder: Same requests. Six and seven were refused by Judge Kramer.

The Court: Six and seven?

Mr. Kinder: I will get it right down here and find out what the Court record is. He gave the first, second, third, fourth, and fifth. Sixth and seventh were objected to by plaintiff, and the Court refused to give either of them.

Mr. Bernsteen: Look at the very end. You will find, one by one, the one I have.

The Court: What ones did he give? That is all.

Mr. Kinder: He gave——

[fol. 210] The Court: The first five?

Mr. Kinder: (Reading) "The plaintiff, at the time, objected and excepted to the action of the Court in charging the jury, before argument, as requested by the defendant in its written requests to charge before argument, numbered 1, 2, 3, 4, 5, and 8." Yes, I know he did.

Mr. Bernsteen: Just a moment.

Mr. Kinder: Six and seven he refused to give.

Mr. Bernsteen: Now, your Honor please, No. 1 he gave.

Mr. Kinder: Yes.

Mr. Bernsteen: And No. 2 he gave.

Mr. Kinder: Yes.

Mr. Bernsteen: And No. 3 he gave. No. 4 he gave. No. 5. Six and seven he did not give.

The Court: At the present time, are you registering objection to any or all of these requests?

Mr. Bernsteen: I object to all of them, your Honor please. Six and seven, he did not give, and 8 he gave, and that was all. The Court gave 1, 2, 3, 4, 5, and 8.

The Court: Gave them all except 6 and 7?

Mr. Bernsteen: Yes.

The Court: Well, No. 5—you wouldn't expect good Judges to agree—but No. 5, I think, is objectionable.

Mr. Bernsteen: I think we had a long argument about that.

The Court: Judge Kramer gave it? I think it is objectionable.

Mr. Bernsteen: We had a long argument upon that one, your Honor. I think about $20.00 worth of argument, in stenographic writings.

Mr. Kinder: On the 5th? I didn't understand.

[fol. 211] Mr. Bernsteen: There's about thirty or forty pages of arguments, here.

Mr. Kinder: Well, you are not going to read that, are you?

Mr. Bernsteen: No. I am just telling him——

The Court: It was to the benefit of the defendant, of course, that he gave it. Your petition in this case is founded on two violations of the Safety Appliance Act. You first say that the couplers were "defective." That is one. The other claim is, that they were "insufficient." Now, there is a vast distinction between "defective" and "insufficient." They may have been perfectly in good order, and all that, but they may have been insufficient.

Mr. Bernsteen: That is right, your Honor please.

The Court: For that reason the fifth, to my mind, is objectionable. It takes one element clear out of the case of the plaintiff.

Mr. Kinder: Let's see what your comment is.

The Court: No. 5.

Mr. Bernsteen: No. 5.

Mr. Kinder: Solely the question of whether or not the couplers on this Baltimore & Ohio car, or either of them, were defective.

The Court: "Defective." There may have been no defect whatever, and yet one of your last witnesses you

called demonstrated that. May say they were insufficient. They allege two violations of the Safety Appliance Act. One is "defective" coupler. The other is "insufficient" coupler, and there is a difference between them. Five, I will not give. Let's see 6.

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DEFENDANT'S EXCEPTION

(Defendant excepts to the Court's refusal to give its written request to charge before argument, No. 5, as submitted.)

[fol. 212] Mr. Kinder: Well, wait a minute. Suppose, here, that either of them were defective or insufficient. Supposing I put that in there, would you give that?

The Court: I don't want to fix your request up for you.

Mr. Kinder: Well, I don't want to——.

The Court: At any rate, the Court will take care of it in his general charge to the jury.

Mr. Kinder: Well, I will—I want to modify that, in "defective" "or insufficient," there.

Mr. Bernsteen: Object to it.

Mr. Kinder: Wait a minute. Let me write that in there.

Mr. Bernsteen: I object to No. 6, also. Six and seven, the other Court left out, too, your Honor please. I forgot about that. No. 8, also, the other Court gave, your Honor please. I object.

Mr. Kinder: Wait a minute, Max.

Mr. Bernsteen: Maybe the Court should refuse to give that one.

Mr. Kinder: Now, I am modifying this request to charge, of mine, by adding the words "or insufficient" after the word "defective."

Mr. Bernsteen: The question, can the jury understand what you mean by "insufficient"? Because the test of the compliance with the Act is the performance of the couplers.

Mr. Kinder: Oh, well, that is your—that is where you and I——

Mr. Bernsteen: That is where my case is based. That is where my case is based, more than anything else. The test of the observance, of the performance, is the com-[fol. 213] pliance with the Act. If they failed to perform, they haven't complied with the Act.

Mr. Kinder: Well, you and I disagree on the law, there, that is all.

Mr. Bernsteen: I know we do.

Mr. Kinder: There is that.

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(Counsel for the Defendant thereupon submitted its written request to charge before argument numbered 5, in the following form, viz.:)

DEFENDANT'S WRITTEN REQUEST TO CHARGE NO. 5 AS AMENDED

"I instruct you that I am submitting to you, so far as any claim of negligence on the part of the defendant is concerned, solely the question whether or not the couplers on the Baltimore & Ohio and P., McK. and Y. cars, or either of them, were defective or insufficient. In other words, unless the plaintiff has established by the greater weight of the evidence, that either or both of these couplers were defective or insufficient, the plaintiff cannot recover in this action, and your verdict must be in favor of the defendant."

The Court: Well, I will have to determine, now, later, since you have changed. Determine it before I start you to work.

Mr. Bernsteen: Objectionable, your Honor please. Object to that.

Mr. Herman Toll: That is, to 8?

Mr. Bernsteen: Six.

Mr. Herman Toll: Oh.

[fol. 214] The Court: As to No. 8, Gentlemen, it has been refused by Judge Kramer. I don't know his reasons.

Mr. Kinder: No. 8, he gave.

Mr. Bernsteen: Well, I know, but—I know he gave it, but he shouldn't have given it.

Mr. Kinder: I thought you said that he refused it.

The Court: No. 8, as I understand, was refused.

Mr. Bernsteen: No—was given.

Mr. Kinder: No.

Mr. Bernsteen: No. 8 was given, your Honor please, by Judge Kramer.

The Court: Well, I shouldn't think the plaintiff in the case would complain of 8. But the defendant is being narrowed to—of course, if he wants it—to a narrower field that I would make it. It is the law. It is the unquestioned law that the plaintiff in this case must prove his injury was proximately caused by a failure to comply with the Safety Appliance Act. Now, anything—if he failed to prove, even if he failed to prove that was the proximate cause, why then anything may be argued as to some other cause for it. If you want to limit it to the ones, then—that was, the action of the train—many things that might be argued in this case on the evidence, that was a cause for this accident, deplorable as it is, other than the condition of the couplers.

Mr. Kinder: Well, I have said "or otherwise," there.

The Court: I didn't get it. Oh, yes, "or otherwise." "Without a signal from the plaintiff, or otherwise"; but that "or otherwise" would naturally be taken to refer to the movement of the train alone. I am refusing it. I am refusing it now.

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[fol. 215] DEFENDANT'S EXCEPTION

(Defendant excepts to the action of the Court in refusing to give its written request for charge before argument, No. 8, as submitted.)

Mr. Kinder: Does your Honor—let me ask your Honor, here. That goes back to the question that existed with respect to 6. Let me, in submitting this, change that—that one or more of these couplers were defective "or insufficient."

Mr. Bernsteen: Which one are you reading on, now?

Mr. Kinder: 8. "Was the defective or insufficient condition"—one or both of these couplers were defective "or insufficient." I would like to modify my submitted request.

The Court: You say Judge Kramer gave those seven?

Mr. Bernsteen: No, he refused No. 7.

Mr. Kinder: No. He refused 6 and 7. But I thought you were discussing 8, there.

The Court: Eight—I am.

Mr. Kinder: Will you permit me to modify the language of 8, there, by adding—I don't know whether it will make

any difference in your Honor's attitude on it, but I want to put it in. There, I have changed that to incorporate "or insufficient." Will you make the same notation on your copy there, Clark?

Mr. Bernsteen: Here is a copy.

Mr. Clark: Changing 8?

Mr. Kinder: Yes.

The Court: The first paragraph of No. 8 is undoubtedly law. The second part of the remainder is law, as far as it goes, but if the defendant wants the Court to limit it to that request, I will do it.

[fol. 216] Mr. Kinder: Will you let me read that over again, Judge?

The Court: These are defendant's requests, not the plaintiff's.

(Defendant's written request for charge before argument, No. 8, as amended and resubmitted, is in the following form, viz.:)

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DEFENDANT'S REQUEST NO. 8 AS AMENDED.

"I instruct you that before the plaintiff is entitled to recover against the defendant in this case, he must not only establish by a greater weight of the evidence that one or both of these couplers were defective or insufficient, but he must further establish that the proximate cause of his accident, as I shall define 'proximate cause,' was a defective or insufficient condition in one or both of these couplers. Hence, if you find that the proximate cause of this accident, as I shall define that term to you, was the movement of this train, whether by the engineer, without a signal from the plaintiff, or otherwise, your verdict will be in favor of the Railway Company, even if you find by the greater weight of the evidence that one or both of these couplers were defective or insufficient."

Mr. Kinder: I think I get the force of your Honor's suggestion, but I think I will stand on the request.

The Court: All right.

Mr. Kinder: Now, your Honor is giving the first four, as I understand it.

Mr. Bernsteen: That is all.

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Mr. Kinder: How? Well, I just want to make a record on what your Honor is giving. The first four, Judge?

[fol. 217] The Court: The Court will now give the first five, as corrected. No. 6 was given by the Judge on the former trial, was it?

Mr. Kinder: No—refused.

Mr. Bernsteen: No. 6 was refused.

The Court: Six was refused? I will determine, later. Seven was given on the former trial?

Mr. Bernsteen: Seven was refused.

Mr. Kinder: Refused.

The Court: Eight was given?

Mr. Bernsteen: Yes, your Honor.

The Court: Six and seven were refused? I will determine, at the time I get the jury back.

Mr. Kinder: And 8, you will determine that later?

The Court: Eight will be given, now, as you have corrected it. You have the corrections. I have the corrected copy. I will furnish the stenographers with it, marked.

(Thereupon, the further trial of said cause was adjourned, at 12:15 o'clock P. M., Thursday, November 12, 1931, until 1:30 o'clock P. M. of the same day.)

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1:30 o'clock P. M., Thursday,
November 12, 1931.

Court met, pursuant to adjournment, and proceeded further with the trial of said cause, as follows:

RENEWAL OF MOTIONS

Mr. Kinder: Your Honor Please, at this time—I overlooked—at this time I desire to renew the several motions which I made at the conclusion of the statement and also at the conclusion of the plaintiff's case, and desire to note an exception, in the event your Honor shall overrule the motion.

[fol. 218] The Court: The Court's ruling will be the same. Give the defendant exceptions.

Mr. Kinder: Exception.

Thereupon the Court charged the Jury before argument, as follows:

COURT'S CHARGE TO JURY BEFORE ARGUMENT

The Court: Ladies and Gentlemen of the Jury: Under the rules of trial procedure in this State, when either party to an action such as this requests of the Court in writing to charge specific matters of law, if the requests are proper law, it is obligatory upon the Court to so instruct the jury, before argument. Under this permissible rule, the Court has been requested to charge you, in certain respects as to the law of this case, before argument of Counsel. Some of these I give, and you will have them with you in your jury room upon your retirement when you consider the case.

I

The plaintiff, in his petition, has charged the defendant with negligence in moving the train while the plaintiff was between the cars. This claim has been withdrawn, and I instruct you to disregard this assignment of negligence.

II

The plaintiff claims, in his petition, that the defendant was negligent in failing to warn him of its purpose to start the train in movement. This claim has been withdrawn by the plaintiff and you will disregard this assignment of negligence.

[fol. 219]

III

Plaintiff claims, in his petition, that the defendant was negligent in failing to keep the train at a standstill until the plaintiff had given a signal for the movement of the same. This claim has been withdrawn by the plaintiff, and you will disregard this assignment of negligence.

IV

Plaintiff claims in his petition that defendant was negligent in starting the train and in moving the same without any signal being given for the movement of the train. This claim has been withdrawn by the plaintiff and you will disregard this assignment of negligence.

V

I instruct you that I am submitting to you, so far as any claim of negligence on the part of the defendant is concerned, solely the question whether or not the couplers on the Baltimore & Ohio and P., McK. & Y. cars, or either of them, were defective or insufficient. In other words, unless the plaintiff has established, by the greater weight of the evidence, that either or both of these couplers were defective or insufficient, the plaintiff cannot recover in this action, and your verdict must be in favor of the defendant.

[fol. 220]

VI

I say to you as a matter of law that the fact that these Baltimore & Ohio and P., McK. & Y. cars failed to couple does not necessarily establish that either or both of the couplers were defective, and you must consider all of the surrounding circumstances, including the curve or curves of the track, the grade thereof, the length of the cars and the fact that there is necessarily a permissible amount of side-play in the draw-bars. Hence, if you find that the failure of these two cars to couple was solely due to the curve, the grade of the track and the non-alignment of the draw-bars, due to a permissible side-play thereof, or that such failure was solely due to any, or any combination, of said causes, the plaintiff cannot recover here, and your verdict will be in favor of The Cuyahoga Valley Railway Company.

VIII

I instruct you that before the plaintiff is entitled to recover against the defendant in this case, he must not only establish by a greater weight of the evidence that one or both of these couplers were defective or insufficient, but he must further establish that the proximate cause of his accident, as I shall define "proximate cause," was a defective or insufficient condition in one or both of these couplers. Hence, if you find that the proximate cause of this accident, as I shall define that term to you, was the movement of this train, whether by the engineer, without a signal from the plaintiff, or otherwise, your verdict will be in favor of the [fol. 221] Railway Company, even if you find by the greater weight of the evidence that one or both of these couplers were defective or insufficient.

This concludes the special charges to you before argument. After argument of Counsel, the Court will instruct you further in its general charge.

The stenographers may note exceptions to the giving, on behalf of the plaintiff, and the refusal of the Court to give Request No. 7 on behalf of the defendant.

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PLAINTIFF'S EXCEPTION

(The plaintiff excepts to the action of the Court in charging the jury, before argument, as requested by the defendant in its written requests to charge before argument, numbered 1, 2, 3, 4, 5, 6, and 8, hereinabove set forth.)

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DEFENDANT'S EXCEPTION

(The defendant excepts to the action of the Court in refusing to charge the jury, before argument, as requested by the defendant in its written request to charge before argument, numbered seven, as the same is hereinbefore correctly set forth.)

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(During the first closing argument by Mr. Bernsteen, on behalf of the plaintiff, the following colloquy among Court and Counsel occurred:)

COLLOQUY

Mr. Bernsteen: Now, when Mr. Kinder said, in his opening argument, they didn't couple the first time, and you believe that at least one coupler was open, as Mr. Gilvary says, they violated the law, because they must couple automatically by impact, without the necessity of going between the cars. There is one law, one judge once said—I will just read what he said—so much better than I can say it. [fol. 222] Mr. Kinder: I shall object to that. I prefer to take my law from this Court and not from a New York court.

The Court: I wasn't listening. What was the statement of Counsel?

Mr. Bernsteen: I was going to say how the law should operate.

Mr. Kinder: Reading some opinion of some court.

The Court: Well, you may say, "I adopt as my argument, what some court has said," but don't go to this case, or anything that is concerned.

Mr. Bernsteen: I won't, if your Honor please. I adopt as my argument——

Mr. Kinder: Exception.

Mr. Bernsteen: —this language. (Reading from a law report:) "The statute makes it obligatory upon the defendant to equip its cars with safety appliances of a kind defined by their operation, namely, couplers that will couple automatically by impact. That duty is absolute and unqualified and contemplates the maintenance of such appliances in working condition at all times. The test of the observance of this duty is the performance of the appliances. The failure of a coupler to work at any time sustains the charge that the Act has been violated."

Mr. Kinder: Move the Court to instruct the jury to disregard that quotation from that opinion, if your Honor please, as inapplicable to this case, which is controlled by what your Honor instructs the jury.

The Court: Well, the Court will instruct the jury that the argument of Counsel on either side is not evidence in the case, now or at any time. Later, the Court will instruct you as to the law.

Mr. Kinder: Exception.

[fol. 223] Mr. Bernsteen: So it is obligatory. It is an absolute duty. (Etc., etc.)

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The defendant requested in writing that the Court incorporate in its general charge the following instruction:

DEFENDANT'S WRITTEN REQUEST FOR CHARGE TO BE INCORPORATED IN THE COURT'S GENERAL CHARGE:

"I instruct you as a matter of law that a verdict in favor of the defendant railway company in this case will not deprive the plaintiff of his remedy under the compensation law of Ohio."

The Court refused to incorporate the foregoing instruction in its general charge to the jury; to which action of the Court the defendant at the time duly excepted.

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Thereupon, after arguments of Counsel, the Court charged the jury generally as follows:

COURT'S CHARGE

Ladies and Gentlemen of the Jury: This action is that of John L. Gilvary against the Cuyahoga Valley Railway Company, wherein the plaintiff, John L. Gilvary, seeks to recover damages against the defendant railway company for and on account of personal injuries sustained by him on the 17th day of April, 1929, while he was in the employ and service of the defendant railway company as a switchman or a brakeman and engaged in coupling or attempting to couple the cars of a railroad train then being made up in the yards of the Otis Steel Company, located in this City of Cleveland.

[fol. 224] For a cause of action, or grounds for recovery, the plaintiff alleges in his petition that at said time, and prior thereto, the defendant, the Cuyahoga Valley Railway Company, was a corporation duly organized under the laws of this state, empowered to and operating a steam railroad system with trackage and yards in this Cuyahoga county, and particularly in and about the yards of the Otis Steel Company, located in Cleveland and owned and maintained—that is, that the defendant owned and maintained two sets of tracks, running north and south, one known as the "east" track, and the other as the "west" track; that the plaintiff, on said 17th day of April, 1929, and for some time prior thereto, was employed by the defendant as a switchman, and on said day was at work upon a certain train of the defendant that was being handled and switched in said yard, and engaged in coupling or attempting to couple the southerly end of said train to a cut of two cars stationed on one of said tracks, and while he was between the northerly end of the northerly of said two cars, and the southerly end of the southerly car of said train, said train was started into movement in a southerly direction, and plaintiff's left arm was crushed between the couplers of

said two end cars, and injured in the respects he claims and specifies and sets forth in his petition, to which I will refer later.

In his petition he further avers that at different times he attempted to couple said train to said cut of two cars, and by reason of the defective and insufficient condition of the couplers upon said cars they failed to couple, necessitating that he, plaintiff, go between the ends of said cars for the purpose of making said coupling. He also avers that at [fol. 225] that time there was in force and in effect an Act of Congress, passed by the Congress of the United States, known as the Federal Safety Appliance Act, which, among other things, provided that a railroad or common carrier such as defendant was, shall not use cars which are not equipped with couplers that couple automatically by impact, and that can be uncoupled, without necessity of going between the ends of the cars.

He then avers that the defendant was negligent in hauling or in using said cars when one or both thereof were not equipped with couplers coupling automatically by impact, and thus necessitating his going between the ends of said cars.

There are other averments of negligence of the defendant—that is, alleged negligence of defendant—contained in plaintiff's petition, which, during the trial, have been withdrawn by the plaintiff, and while they are physically a part of his petition, which petition you will have with you in your jury room for reference purposes, yet such additional averments you will not consider at any time, for any purpose.

Plaintiff in this case is basing his right to recovery entirely upon one ground, and that ground is the alleged failure of the defendant railway company to have its said cars equipped with couplings automatically coupling by impact.

As a direct and proximate cause of defendant's alleged failure to have its said cars so equipped, plaintiff says he sustained injury to his left arm, in that the radius and ulna bones thereof were crushed and fractured, the ligaments, tendons, and tissues of his left arm destroyed, that his [fol. 226] whole left arm and hand have been permanently crippled, and that the use, movement and strength thereof have been completely destroyed, and that because of said injuries he was confined to the hospital for a period of five

weeks, was and still is under a doctor's care, that he suffered and yet suffers great pain, and has since been unable to perform any work; that his ability to perform manual work, particularly that of a railroad employee, has become lost, and his earning capacity has been greatly limited and impaired, and that, at the time of his injury, he was capable of and was earning $200.00 per month. He alleges he has sustained damages in the sum of $50,000.00, and he is asking recovery for that amount.

Now, the fact that he so alleges his damage to be and asks judgment for $50,000.00, I instruct you now, as a matter of law, is not and will not be taken by you at any time as an indication that he is entitled to receive that amount or any other sum. It is merely the maximum amount which he claims, and he is asking recovery for.

The defendant, the Cuyahoga Valley Railway Company, has filed its answer to plaintiff's petition, therein denominating its several defenses as a "first defense," a "second defense," and a "third defense." Defendant's second defense alleges that plaintiff was an experienced employee, fully familiar with the work in which he was engaged, and that he assumed the risk of the accident of which he complains. Now, this defense you will not consider, but disregard, since the plaintiff has now withdrawn all of his claims of negligences—of alleged negligence of the defendant, excepting that of its alleged failure to have its cars equipped with couplings, coupling automatically by impact; [fol. 227] and if such is the fact, and you so find the fact to be, the defense of assumption of risk, in law, would be no defense to this claim made by the plaintiff against the defendant in this case.

The third defense of the defendant pleads compliance by it with what is commonly known as the Workmen's Compensation Act, a law of this state which provides that an employer shall pay its employees, injured or killed in the course of their employment, certain fixed amounts, regardless of whether the employee was or was not careless or negligent. As to this defense, even though plaintiff may have, before the time of his injury, voluntarily in writing accepted employment and agreed to be bound by the provisions of the Workmen's Compensation Law of this State, yet that would be no legal defense to his instituting and prosecuting this action upon the claim that he does. So

this defense, this third defense, denominated "third defense," you will not consider.

You will, however, consider defendant's first defense, and that only, of the three defenses appearing in its answer. This answer you will likewise have with you in your jury room, and I am instructing you in these particulars because, as they are physically a part—the second and third defenses are physically a part of the answer, but you will not consider them.

The defendant's first defense, which you will consider, admits that it was and is a corporation, engaged in the operation of a system of steam railroad, located entirely in Cuyahoga county, and that, on April 17, 1929, plaintiff was in its employ as a switchman, and while so engaged was injured; but the nature and extent of his injury that plaintiff avers he sustained, the defendant denies. Defendant [fol. 228] also denies that said couplers were defective or insufficient and would not couple automatically by impact. The defendant denies all the averments of plaintiff's petition excepting such as it specifically admits, and these admissions are, as I have stated them to you, and therefore the admissions do not require proof.

During the trial, the defendant also admitted the Act of Congress referred to, and the provisions thereof, and that the provisions thereof were in force and effect, and as alleged by plaintiff in his petition; and therefore no proof is required of plaintiff as to such admitted facts.

But in this case the burden of proof is upon plaintiff to prove by a preponderance of the evidence in the case that, at the time and place in question, said cars were not equipped with couplers, coupling automatically by impact, and that as a direct result thereof, proximately caused thereby plaintiff sustained injury of the nature and character he avers, and also the extent and amount thereof. There is no burden of proof upon the defendant. The burden of proof at all times on all issues for your consideration in this case, excepting those admitted by the defendant, is upon the plaintiff, to prove by a preponderance of the evidence.

By "preponderance of the evidence" is meant the greater weight of the evidence in the case, that evidence consisting of the testimony of the witnesses, the documentary proof, and the exhibits offered and admitted in evi-

dence, that induces belief or influences your minds in arriving at the conclusions you reach. It does not necessarily mean that one side has more witnesses than the other, and it is not to be so measured. Rather, it is to be determined by the greater weight of the credible evidence in the case. [fol. 229] If however, the evidence on any disputed material fact be of equal force and weight with you, the one having the burden of proof upon that question has failed, and your finding upon such fact would be in favor of the other.

Now, by "proximate cause" is meant that cause which is the direct, efficient and superior cause producing the injury or result complained of, and without which it would not have occurred. The injury must have been the direct and not the remote result thereof. In this sense, in this case, you will particularly inquire into the evidence to determine whether plaintiff's injuries were the direct and proximate result of a defective or insufficient coupler, as alleged, or the remote result thereof; in other words, whether the couplers of the cars in question were, one or both, the direct and proximate cause of plaintiff's injury, and not the remote cause thereof. If you find under all the evidence, by a preponderance thereof, the plaintiff's said injuries were the proximate and direct result of a defective or of an insufficient coupler; that is, one, although not defective, was nevertheless inadequate for the purpose or use intended, then your finding will be for plaintiff for such compensatory damages you may find under the evidence proximately resulted to him because thereof, and not otherwise.

A defective coupler is one that, either by reason of its incomplete or faulty construction or imperfect dimensions or weak condition, renders it inoperative on use to couple automatically by impact, while an insufficient coupler is one such as I have already described to you.

The law required of defendant that it have its railroad cars equipped with couplers coupling automatically by im- [fol. 230] pact. It imposed upon the defendant the positive duty that it have such couplers upon its cars, including the ones here in question, and that they be free from defect and be sufficient for such purpose—that is, for automatic coupling by impact, regardless of the kind or make, the humane purpose being primarily the protection of the

employees and obviating the necessity or requirement of an employee going or being between the railroad cars. The grade and curve of the track at the point of impact in question, I construe to be, and so have instructed you, are factors to be considered by you as to the practical operation of a railroad, and particularly upon the question of whether a coupler that merely does or does not automatically couple by impact under any and all existing conditions is or is not a defective or insufficient coupler.

Now, it will be your duty—you, the jury—to determine from the evidence whether or not the coupler or couplers of the cars in question were or were not defective or insufficient, and if so, whether any such defect or insufficiency was the proximate or direct cause of plaintiff's injury, or the remote cause thereof. If but the remote cause thereof, plaintiff may not recover in this action. He may recover only in the event you find a defective or insufficient coupler was the proximate or direct cause of his injury.

You are judges of the fact. You are judges also of the credibility of the witnesses in the case. After weighing and considering the testimony of all the witnesses in the case, it is within your province to give credit as you deem proper. You may give full credit, part credit, or no credit, after weighing and considering their testimony. In deter- [fol. 231] mining the weight and credit you give to the testimony of any witness in the case, it is proper for you to take into consideration the witness' relation to either of the parties in the case, his interest, if any, in the result of the case, his bias or prejudice, if any, his apparent means of knowing the facts concerning which he testifies in court, the manner in which he testifies, and any and all facts and circumstances in and surrounding the testimony as given by the witness in court, and give credit as you determine.

If your finding in this case be in favor of the plaintiff, then you will consider and determine the amount of damages that you will award him. Any amount of damage that you award to the plaintiff must be by way of compensation only. That is, compensation for loss to him, injury to him, proximately caused by the matter he complains of.

In determining the amount of the damage that you will award to him, if you find for him, you will take into consideration his age, his earning capacity at the time, the nature and extent of the injuries that he received, the

permanency thereof, the pain and suffering that he may have endured in the past, and whatever pain you may find he is reasonably certain to have in the future, his loss of earning capacity—that is, the amount of loss he has already sustained and the impairment of his earning capacity in the future, and make your award to him in one sum, which you will set out in one sum in your verdict, accordingly. Do not award anything to the plaintiff in any respect because of feeling of sympathy toward him or of bias or prejudice against the defendant.

The defendant in this case is a corporation. The plaintiff is an individual, and that fact should not affect you at [fol. 232] all in your determination of any of the matters in this case.

Before you can return a verdict nine of your number must agree. Whenever nine or more of you have agreed upon a verdict, those of you agreeing to that verdict will sign it. Those not agreeing will not sign the verdict.

Upon your retirement to your jury-room, if you desire, you may select one of your number as foreman. You will have with you in your jury-room the instructions which the Court gave you before argument, the pleadings in the case, consisting of the petition and the answer. You will not consider any of these are evidence. You will also have with you all exhibits that have been admitted upon trial. What these are, Counsel will determine, and see that they are supplied to the jury.

When you have agreed upon a verdict, Ladies and Gentlemen, make the fact known and return it into court.

Unless Counsel can call the Court's attention to some omission, I do not think of anything more.

Mr. Kinder: None save the request which I made, which I understood your Honor denied.

The Court: Oh, yes. Both sides, exceptions in every particular. You may take the jury to the room. Now, Gentlemen, you will be responsible for the exhibits that go in. Two forms of verdict will be furnished you, one in favor of the plaintiff, the other in favor of the defendant. If your finding is not in favor of the plaintiff, it should be in favor of the defendant. (To the Bailiff) Pleadings, petition, the answer. You have the special instructions.

(Thereupon the Jury retired to consider of its verdict.)

[fol. 233] The Court: Make up your record any way you want to, Gentlemen, on either side.

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DEFENDANT'S EXCEPTIONS TO CHARGE.

Mr. Kinder: I am going to take a few exceptions to your charge. Defendant excepts generally to the charge, under the statute; excepts to the refusal of the Court to incorporate and charge in his general charge the instruction requested; and excepts specifically to that part of the charge which instructed the jury to disregard the third defense, and the substance therein set forth; excepts to the charge on the matter of proximate cause; excepts to the charge advising the jury to disregard the second defense of the answer, to-wit, the defense of assumption of risk; and generally, under the statute.

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PLAINTIFF'S EXCEPTIONS TO CHARGE

Mr. Bernsteen: I want a general exception, and also particular exception, particularly to the charge of the Court where he says that they should take into consideration the curve and play of the draw-bars, and other things which may affect the coupling or the operation of the law, and the grade. Put the word "grade" in there, also.

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VERDICT.

Thereupon, after deliberation, the jury returned into open court its verdict for the plaintiff and against the defendant, as the same more fully appears by the record; to which the defendant by its Counsel then and there duly excepted and still excepts.

And thereupon, to-wit, on November 14, A. D. 1931, being within three days of the returning of said verdict, and within the time provided by law, the defendant filed herein its motion for a new trial, for the reasons and upon the grounds in said motion set forth, as the same more fully appears by the record.

[fol. 234] ORDER OVERRULING MOTION FOR NEW TRIAL

And thereafter, to-wit, on Monday, the 1st day of February, A. D. 1932, the same being one of the days of the regular January 1932 Term of said Court, the defendant's motion for a new trial coming on regularly to be heard, the Court, being well and sufficiently advised in the premises, did overrule the same; to which the defendant, by its Counsel, then and there duly excepted and still excepts.

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JUDGMENT

And thereupon, to-wit, on the same day, February 1, A. D. 1932, the Court entered judgment on the verdict of the jury, for the plaintiff and against the defendant; as the same more fully appears by the record herein; to which action of the Court the defendant at the time duly excepted and still excepts.

And thereafter, to-wit, on the — day of March, A. D. 1932, the same being within forty days of the overruling of the defendant's said motion for a new trial, and within the time provided by law, the defendant filed this, its Bill of Exception, and prayed that the same might be allowed and signed by the Trial Judge as and for its Bill of Exceptions herein, and that the same be filed as and be made a part of the record herein, but not spread at large on the journal.

Receipt of which is hereby acknowledged, this 9th day of March, A. D. 1932.

Thos. C. Cook, Clerk, by R. E. Mollenkopf, Deputy.

[fol. 235] And thereupon, notice of the filing of said Bill of Exceptions was duly served on Messrs. Bernsteen & Bernsteen (M. L. Bernsteen, Esq., and Harry Clark, Esq., of Counsel), attorneys for the plaintiff, the adverse party herein, this 10th day of March, A. D. 1932.

And thereupon, to-wit, upon the 22nd day of March, A. D. 1932, being not less than ten days after such notice of the filing of this Bill of Exceptions, and within five days after the expiration of such ten days, to-wit, 12 days after the service of such notice, this Bill of Exceptions was duly transmitted to said Trial Judge by the Clerk of said Court, together with all objections and amendments

filed thereto; the receipt whereof is hereby acknowledged, this 23rd day of March, A. D. 1932.

C. S. Turnbaugh, Trial Judge.

ORDER SETTLING BILL OF EXCEPTIONS

And thereupon, to-wit, on the 24th day of March, A. D. 1932, the same being within five days after the receipt of said Bill of Exceptions and all objections and amendments thereto from said Clerk, and within the time allowed by law, and upon due consideration of the same and the objections and amendments thereto, the said Bill of Exceptions is hereby corrected, allowed and signed by the Court, and it is ordered that the same be transmitted to the office of the clerk of this court, forthwith, and that the same be filed as, and made a part of the record in this case, but not spread at large upon the journal.

C. S. Turnbaugh, Trial Judge.

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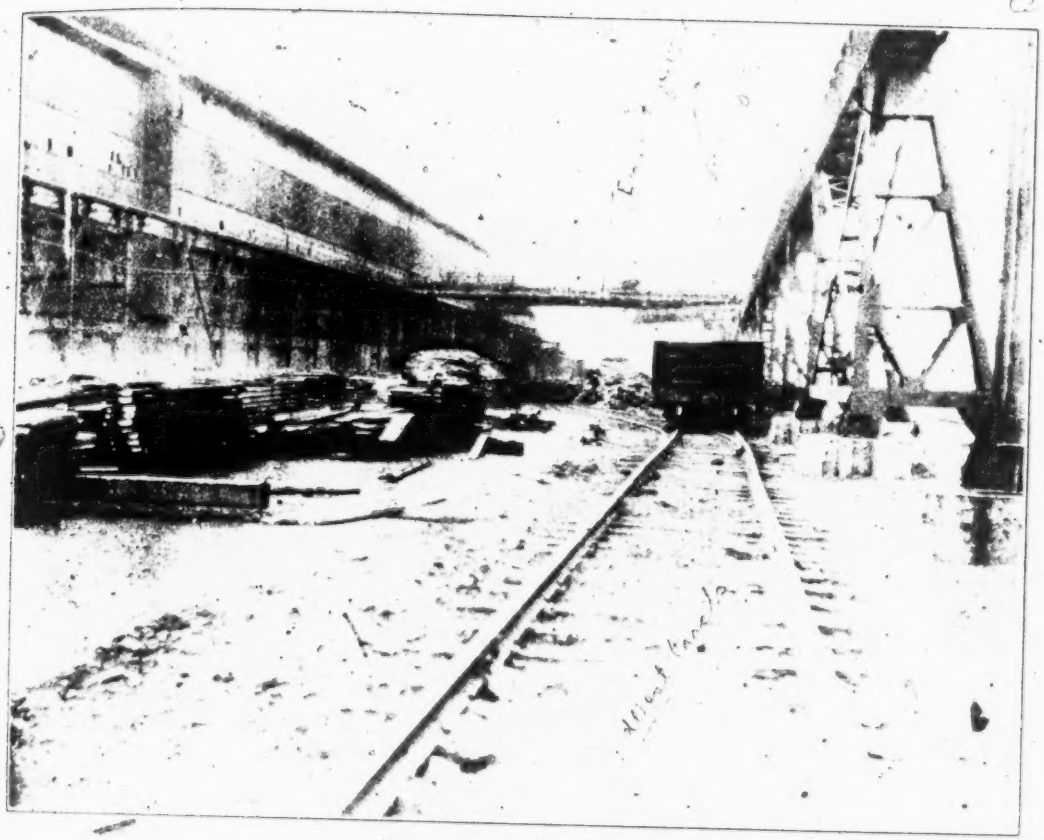
[fol. 236] DEFENDANT'S EXHIBIT A, STIPULATION

It is hereby stipulated by and between Counsel for the plaintiff and defendant that the so-called "model coupler," offered in evidence upon the trial of said cause and marked for identification "Defendant's Exhibit A," may be incorporated in this Defendant's Bill of Exceptions by this reference, and need not be physically attached to and made a part of this Bill of Exceptions, but may remain in the possession of Counsel for the Defendant, to be produced by them at any subsequent trial or hearing of said cause; that the same is now, therefore, incorporated in this Bill of Exceptions by this reference, and it is stipulated that this Bill of Exceptions shall have like force and effect as though said Defendant's Exhibit A were hereto physically attached and made a part hereof.

John L. Gilvary, by Bernsteen & Bernsteen, Counsel for Plaintiff. Cuyahoga Valley Railway Company, by Tolles, Hogsett & Ginn, Counsel for Defendant.

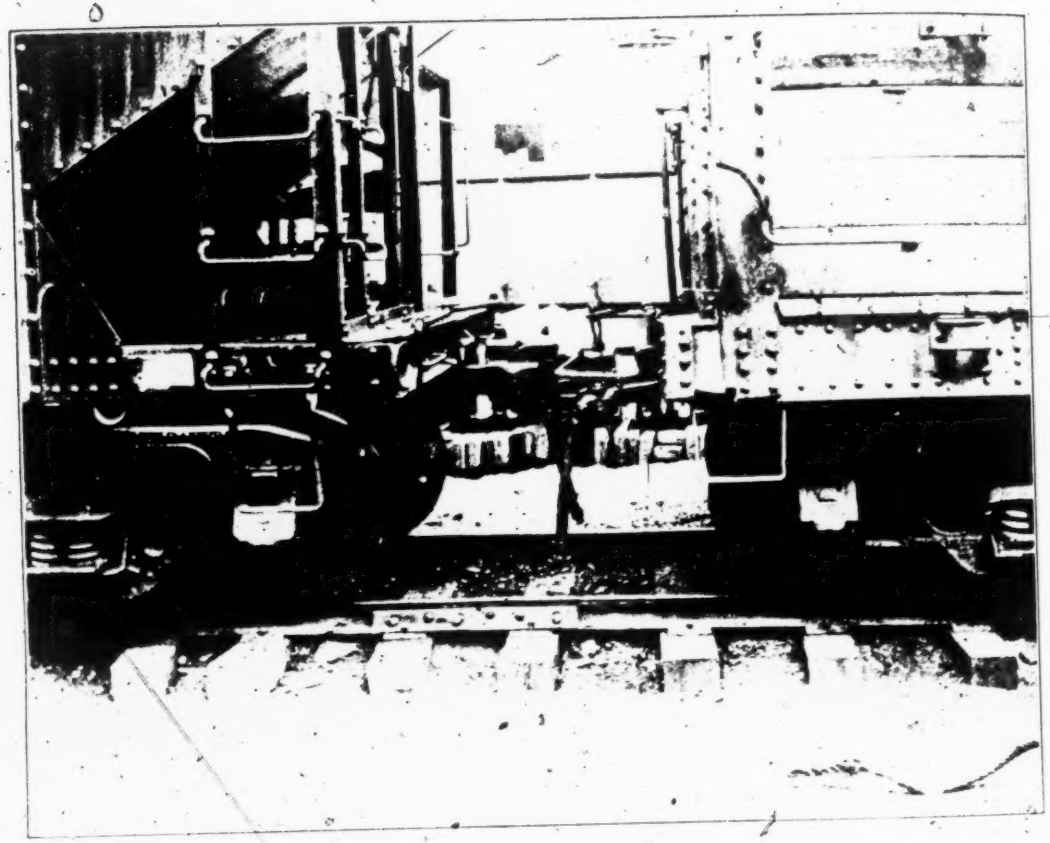
(Here follow Defendants Exhibits Nos. 5, 6, 7 and 8, side folios 237-244)

237-238

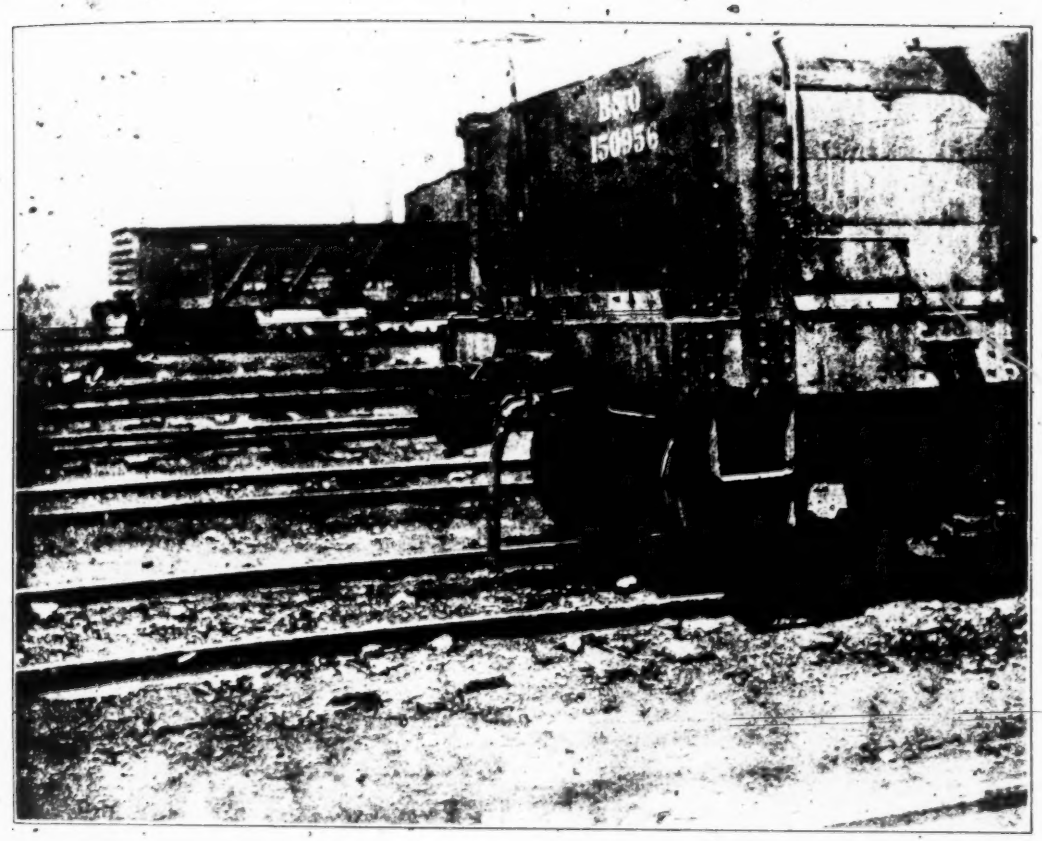


DEFENDANT'S EXHIBIT NO. 5

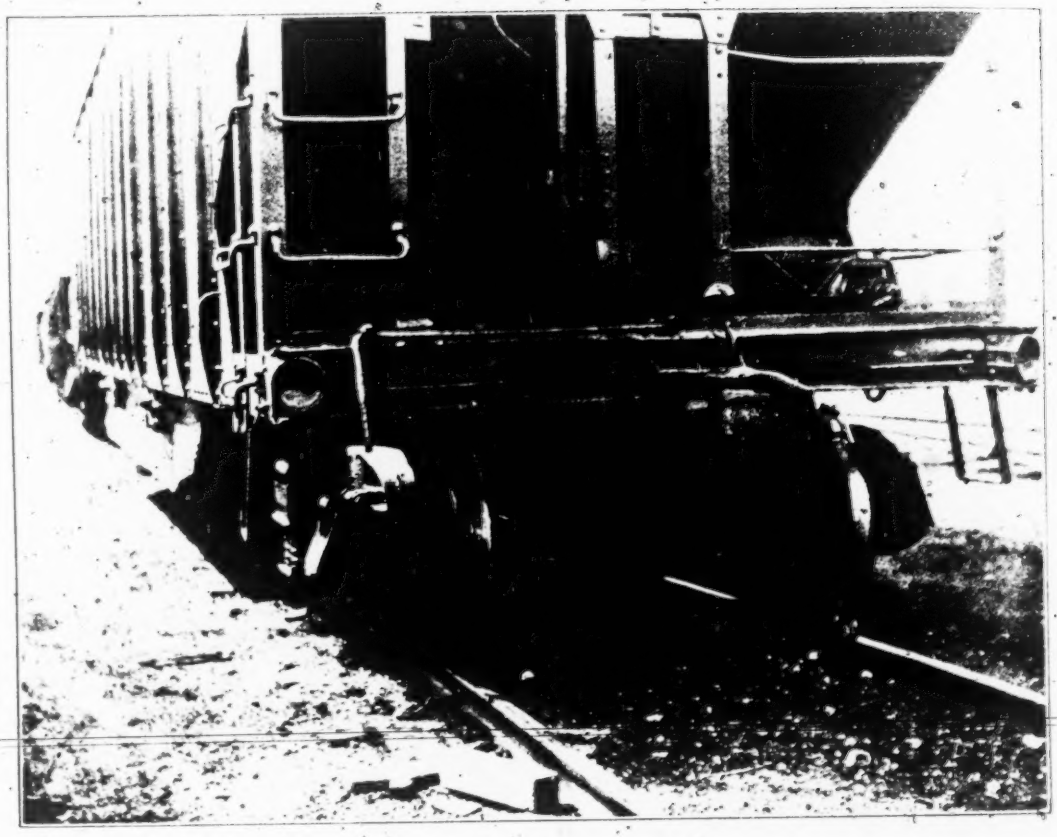
239-240



DEFENDANT'S EXHIBIT NO. 6




DEFENDANT'S EXHIBIT NO. 7



DEFENDANT'S EXHIBIT NO. 8

[fol. 245] STIPULATION RE DEFENDANT'S EXHIBITS

It is hereby stipulated by and between counsel for the plaintiff and defendant, in addition to the stipulation shown on page 236 of the Record, entitled "Defendant's Exhibit A," that the large map, marked "Defendant's Exhibit 1," the agreement, marked "Defendant's Exhibit 2," the inspection report, marked "Defendant's Exhibit 3," the small map, marked "Defendant's Exhibit 4," and photographs marked "Defendant's Exhibits 5, 6, 7 and 8," all of the aforesaid exhibits having been offered in evidence upon the trial of said cause, also stipulation not marked as an exhibit, but referred to on page 199 of the Record, may be incorporated in this Record by this reference and need not be physically attached thereto and made a part of the same but may remain in the possession of the Clerk of the Supreme Court of the State of Ohio and may be produced by counsel for either the plaintiff or defendant at any hearing of said cause with the same force and effect as though the aforesaid exhibits were physically attached to and made a part hereof; that the same are now therefore incorported in this Record by this reference and it is stipulated that said exhibits shall have the same force and effect as though they were hereto physically attached and made a part hereof.

John L. Gilvary, by Bernsteen & Bernsteen, Counsel for Defendant. Cuyahoga Valley Railway Company, by Tolles, Hogsett & Ginn, Counsel for Plaintiff.

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[fol. 246] IN SUPREME COURT OF OHIO

No. 23947

(Title)

JOHN L. GILVARY

vs.

CUYAHOGA VALLEY RAILWAY COMPANY

Action: Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record.

Error to the Court of Appeals of Cuyahoga County

Attorneys: For plaintiff in error, Bernsteen & Bernsteen, Cleveland; for defendant in error, Tolles, Hogsett & Ginn, Cleveland.

Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments, Orders and Decrees

Docket and Journal Entries

1933.

January 20. Petition in error as of right and precipe for summons filed.

January 20. Motion for an order to certify record, plaintiff's printed brief on motion, notice and proof of service filed.

January 20. Summons in error issued to the Sheriff of Cuyahoga County, service to be made on defendant, sent by registered mail, returnable January 30th, 1933, receipt # 8928.

January 30. Summons in error returned and filed, endorsed, "State of Ohio, Cuyahoga County S. S. On the 23rd day of January, 1933, I served this writ on the within named defendant in error by handing a true and certified copy thereof with all endorsements thereon to Tolles, Hogsett & Ginn, W. A. Kinder, attorney of record for the said defendant in error, The Cuyahoga Valley Railway Co. John A. Sulzman, Sheriff, by C. M. Pittenger, deputy Sheriff, fee 94c.

February 21. Defendant's printed brief and proof of service filed by leave of Court.

March 2. Court of Appeals transcript, original papers and bill of exceptions and exhibits filed.

March 2. Application of plaintiff in error for extension of time to file printed record and briefs filed and proof of service filed.

March 2. Entry extending time for printed record and plaintiff's printed brief to March 30, 1933. Carl V. Weygandt, C. J. J. 33, p. 124.

March 2. Papers taken by H. Clark of Bernsteen & Bernsteen. Returned, 3-24-33.

1933.

March 1. Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record overruled. J. 33, p. 117.

March 2. Case stands for hearing on petition in error as of right—by order of the Court.

[fol. 247]

March 21. Plaintiff's printed brief on merits filed. 3-22-33 proof of service filed.

March 21. Printed record filed. 3-22-33 proof of service filed.

April 19. Defendant's printed brief and proof of service filed.

May 3. Plaintiff's printed reply brief and proof of service filed.

June 20. Counsel notified case will be re-argued in October.

October 25. Judgment affirmed. J. 33, p. 282.

November 1. Mandate issued. Original papers and bill of exceptions sent to Clerk.

## Journal Entries

March 1, 1933.—Motion for an order directing the Court of Appeals of Cuyahoga County to certify its record. It is ordered by the Court that this motion be, and the same hereby is overruled. J. 33, p. 117.

March 2, 1933.—Entry: Upon application of plaintiff in error, and for good cause shown, it is ordered that the time for filing printed record and brief herein be, and the same hereby is extended until 30th day of March, 1933. Carl V. Weygandt, C. J. J. 33, p. 124.

October 25, 1933.—Error to the Court of Appeals of Cuyahoga County. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it appearing that the Judges of the Court are equally divided in opinion as to the merits of this case (one Judge not participating) and are for that reason unable to agree upon a judgment, and the entry of that fact constituting an affirmance of the judgment of the Court of Appeals, it is ordered that the defendant in error recover from plaintiff in error its costs herein expended, taxed at $——; and it appearing to the Court that there were reason-

able grounds for this proceeding in error, it is ordered that no penalty be assessed herein. Ordered, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this Judgment into Execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County "for entry". J. #33, page 282.

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CERTIFICATE OF CLERK

I, Seba H. Miller, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing transcript of docket and journal entries of the Supreme Court of Ohio in the above entitled cause are truly taken and correctly copied from the records of said Supreme Court in said Cause No. 23947, to-wit: from Journal No. 33 and Minute Book No. 46 of said Supreme Court of Ohio.

In Witness Whereof, I have hereunto subscribed my name and affixed hereto the seal of the Supreme Court of Ohio at Columbus, Ohio, this 1st day of November, A. D. 1933. Seba H. Miller, Clerk, by Frank Welling, Deputy. (Seal of the Supreme Court of the State of Ohio.)

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[fol. 248] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on cover: File No. 38,178. Ohio Supreme Court. Term No. 575. John L. Gilvary, petitioner, vs. Cuyahoga Valley Railway Company. Petition for a writ of certiorari and exhibit thereto. Filed November 8, 1933. File No. 575, O. T., 1933.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 575

JOHN L. GILVARY, Petitioner,

vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY, Respondent

STIPULATION AND ADDITION TO RECORD

It is hereby stipulated by and between Petitioner, John L. Gilvary, and Respondent, The Cuyahoga Valley Railway Company, that the following attached certified parts of the Record in the Supreme Court of Ohio, consisting of "Stipulation" and "Defendant's Exhibit 2", both of which are the subject of the "Stipulation Re Defendant's Exhibits" (Transcript of Record page 197), be printed and as such added to the Transcript of Record on file in this Court.

Dated January 11th, 1934.

Glen A. Boone, Counsel for Petitioner. W. T. Kinder, Counsel for Respondent.

STIPULATION

1. Subject to the right of an objection on the ground of relevancy, competency, and materiality, plaintiff concedes that on and prior to the date of the accident to the plaintiff, the defendant, the Cuyahoga Valley Railway Company, had complied with the so-called Workmen's Compensation Law of the State of Ohio.

2. That there was on file with the Industrial Commission of Ohio, an agreement known as the Acceptance and Notice of Election by Employer and Employees, under Section 51 of the Workmen's Compensation Act, signed by the plaintiff, John Gilvary, and by the employer, the Cuyahoga Valley Railway Company.

3. That such agreement, known as the Acceptance and Notice of Election, etc., above referred to, had been filed with and approved by the State Liability Board of Awards, now known as the Industrial Commission of Ohio.

4. That Defendant's Exhibit 2 is a true and correct copy of the agreement above referred to.

DEF'T. EX. 2

NOTE.—This form, after being fully filled out, should accompany the "Application for Classification of Premium Rating." Form should also be filled out to cover each new employe.

The Industrial Commission of Ohio, Columbus, Ohio

Section 51 of Compensation Act

(Section 1465-98 G. C.)

The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer, and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

Acceptance and Notice of Election by Employer and Employes Under Section 51 of Workmen's Compensation Act

To the Industrial Commission of Ohio:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and its undersigned employes, working only in this state, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, hereby elect that their respective rights and liabilities

growing out of injury or death to such employes or any of them, or their dependents in case of death, shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employes are engaged in intrastate commerce.

Said employer and employes hereby severally request the Industrial Commission of Ohio to approve their election to operate under the Workmen's Compensation Law of Ohio.

Employes: John Gilvary. —— ——, (Employer), by —— ——.

Oct. 12, 1928.

(Continued on back hereof.)

Acceptance and Notice of Election under Section 51 of Workmen's Compensation Act of —. —— —— employer, and (its, their, his) employes, continued. Employe: ——.

---

THE STATE OF OHIO,
Cuyahoga County, ss:

I, John J. Busher, Clerk of the Court of Common Pleas within and for said County and in whose custody the files, journals and records of said Court and the Court of Appeals of the Eighth Judicial District of Ohio are required by the laws of the State of Ohio to be kept, hereby certify that the attached (1) paper marked "Stipulation" and (2) paper marked "Defendant's Exhibit 2" are taken from the record in my possession as said Clerk, in the case of John L. Gilvary vs. The Cuyahoga Valley Railway Company and constituted a part of the record in said cause.

In Testimony Whereof I do hereby subscribe my name officially, and affix the seal of said Court at the Court House in the City of Cleveland, in said County, this 11th day of January, A. D. 1934.

[Seal Common Pleas Court, Cuyahoga County, Ohio.]

John J. Busher, Clerk.

I, Walter McMahon, Presiding Judge of the Court of Common Pleas, within and for the Eleventh Judicial District of the State of Ohio, in which District is said County

of Cuyahoga, do hereby certify that John J. Busher was at the date of the above certificate, and now is, Clerk of said Court of Common Pleas, with- and for said Cuyahoga County, and State of Ohio, and that said Clerk is the officer in whose custody said original record, to-wit, (1) said "Stipulation" and (2) said "Defendant's Exhibit 2" are required to be kept by the Laws of the State of Ohio, and authorized by the Laws of the State of Ohio, to certify as aforesaid, and that said attestation in respect of said record is in due form of Law.

Signed by me and dated at Cleveland, Cuyahoga County, Ohio, this 11th day of January, A. D. 1934.

Walter McMahon, Presiding Judge as aforesaid.

I, John J. Busher, Clerk of the Court of Common Pleas, a Court of Record of Cuyahoga County, do hereby certify that Walter McMahon was at the date of the foregoing certificate the duly elected, qualified and acting Presiding Judge of the Court of Common Pleas of Cuyahoga County.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at Cleveland, this 11th day of January, A. D. 1934.

[Seal Common Pleas Court, Cuyahoga County, Ohio.]

John J. Busher, Clerk.

(4442)

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# In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 575

JOHN L. GILVARY,
*Petitioner,*

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Ohio and BRIEF IN SUPPORT OF PETITION.

GLEN A. BOONE,
*Attorney for Petitioner.*

BERNSTEEN & BERNSTEEN,
M. L. BERNSTEEN,
J. E. MATHEWS,
*Of Counsel.*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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# In the Supreme Court of the United States

**OCTOBER TERM, 1933.**

## No. .....

JOHN L. GILVARY,
*Petitioner,*

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
### To the Supreme Court of Ohio.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of John L. Gilvary respectfully shows:—

### ABRIDGED PRELIMINARY STATEMENT OF THE PROBLEM INVOLVED.

Action in an Ohio court by a railroad employee against his employer, the Cuyahoga Valley Railway Company, operating a railroad in interstate commerce, to recover for injuries from a defective coupler, in violation of the Federal Safety Appliance Act.

Defense that the immediate movement was intrastate and that the plaintiff was bound by a State Workmen's Compensation Law.

No compensation was ever applied for or accepted by plaintiff.

Common Pleas judgment for plaintiff reversed by a majority of a County reviewing Court of Appeals (one judge dissenting) and final judgment entered for Railroad, based on asserted applicability of compensation system. No opinion.

Highest Court of State (Supreme Court) divide three-three, thus automatically affirming the judgment in favor of the Railway. No opinion.

The petition in Common Pleas Court and all evidence and briefs rested the plaintiff's case wholly upon the Federal Act. *This denial of a Federal cause of action violates every recorded decision on the subject in this country, both State and Federal; and particularly those of this Court.* To uphold it would be subversive of the doctrine of this Court as to the paramount and exclusive nature of Federal rights, remedies and jurisdiction, as against State systems of compensation.

By a peculiarity of Ohio law this unique judgment rests upon the decision of two County court judges. Against their holding may be marshalled those of two Common Pleas judges, one Court of Appeals judge and three judges of the highest Court of the State.

The journal entry eliminated all non-Federal questions and rests solely on the issue as between the asserted Federal right and the interposed State scheme of compensation.

If the decision in question is to be accepted as law it will necessarily follow that in all cases of injury (whether tortious or merely accidental) of an employee of an interstate railroad in *intra*state commerce but in claimed violation of the Federal Safety Appliance laws, the jurisdiction heretofore exercised by the State and Federal courts will be transferred in like circumstances to the compensation tribunals of the several States.

## OUTLINE OF CASE.

Petitioner (hereinafter called Gilvary) sued the respondent (hereinafter called the Railroad) in the Court of Common Pleas of Cuyahoga County, Ohio, to recover for a violation of the Federal Safety Appliance Act. Two judges of that Court, in successive trials, sustained his right and he recovered a verdict. The Railroad was admittedly a highway of interstate commerce. At the time of Gilvary's injury the movement of cars between which he was hurt was intrastate; but the coupler defect causing the injury was a clear violation of the Federal Safety Appliance Act. The defense was that his rights were controlled solely by the Workmen's Compensation Law of Ohio.

In the next higher Court (the Court of Appeals of Cuyahoga County, Ohio) two judges, constituting a majority of that Court (one judge dissenting), denied the Federal right, held that the State law furnished the exclusive remedy and entered final judgment in favor of the railroad.

On error the Supreme Court of the State, being the highest reviewing Court in Ohio, six judges participating divided equally, with the result, under Article 4, Section 2 of the Ohio Constitution, of affirming the judgment of the Cuyahoga County Court of Appeals. The journal entry of the Court of Appeals based the reversal and final judgment upon the sole ground that Gilvary, by signing a certain application or "election" at the time of entering the employ of the Railroad, had so subjected himself to the State scheme of compensation as to lose his rights under the Federal statute. All other grounds of error were overruled. The automatic affirmance of this judgment therefore leaves, as the sole continuing issue, the conflict between the Federal cause of action and the local scheme of compensation. No non-Federal issue remains in the case. The judg-

ment of the State intermediate Court, by denying the Federal right, was in direct conflict with the following decisions:

*Texas & Pacific Railway vs. Rigsby*, 241 U. S. 33;
*Ross vs. Schooley*, 257 F. R. 290 (Cert. Den. 249 U. S. 615);
*Ward vs. Erie Railroad*, 230 N. Y. 230 (Cert. Den. 256 U. S. 696);
*Director General vs. Roland*, 265 F. R. 138 (Manton, J.);
*New York Central R. R. vs. Winfield*, 244 U. S. 147.

In three of these cases this Court recognized directly, by its entry, a right of action where, as here, injury resulted from violation of the Federal Safety Appliance Act, and in two of them this right was distinctly held to supersede any local provision or substitute such as workmen's compensation.

Said State Court judgment was also in conflict with the controlling decisions of this Court in holding that Gilvary could be put to any "election" between the Federal right in question and a scheme of local compensation. These decisions are:

*Erie Railroad vs. Winfield*, 244 U. S. 170;
*Employers' Liability Co. vs. Cook*, 281 U. S. 233;
*Baizley Iron Works vs. Span*, 281 U. S. 222;
*Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149.

The only statement of the grounds for the decision below is that contained in the journal entry of the Cuyahoga County intermediate court which appears at page 18, *infra*, Record page 5. The decision complained of involves a Federal question of substance previously determined by this Court, but such decision was manifestly not in accord with the applicable decisions.

## LEGAL QUESTIONS PRESENTED BY THIS PETITION.

I.

A judgment of a State Court denying a cause of action under the Federal Safety Appliance Act and sustaining, as a defense thereto, the alleged operation of a State Workmen's Compensation Act, is in conflict with the principles established and enforced in the Supreme Court of the United States.

II.

Where an employee, upon entering the employ of a railroad, signs a written instrument called an "election," purporting to subject him to a State compensation law as to claims for injuries thereafter sustained "in intrastate commerce," such "election" is without legal vitality as to a cause of action arising upon a violation of a Federal Safety Appliance Act. This is particularly true where the language of such election does not purport to include rights based on such violations and by its language excludes from its operation cases covered by any Act of Congress.

## JURISDICTION.

The jurisdiction of this Court is invoked on the authority of Section 237 Judicial Code, Subdivision (b), the plaintiff below having based his right of action upon a statute of the United States (Section 2, Title 45, United States Code), and such claim having been denied and the provisions of a State statute (G. C. 1465-98, Ohio General Code) substituted as the measure of his rights.

For convenience the section of the Federal Safety Appliance Act above cited is set forth.

The original Act was amended March 2nd, 1903, by the enactment of Section 1 as follows:

> "Section 1. That the provisions and requirements of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; *and the provisions and requirements hereof and of said Acts* relating to train brakes, *automatic couplers*, grab irons, and the height of drawbars shall be held to apply to *all trains, locomotives, tenders, cars*, and similar vehicles *used on any railroad engaged in interstate commerce*, and in the Territories and the District of Columbia, and to all other locomotives * * *."

Section 2 (of original Act):

> "That on and after January 1st, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

No question remains in the case as to Gilvary being seriously injured by having to go between the cars because of the failure of the automatic coupler to work.

The Ohio statute, General Code Section 1465-98, is set forth *infra* at page 17.

## PRAYER.

In order to correct the error complained of and to the end that the right of petitioner to have the judgments of the said Supreme Court of Ohio and of the Cuyahoga County Court of Appeals (Eighth Judicial District) reversed, your petitioner prays that a writ of certiorari may be issued under the seal of this Court, directed to the judges of the Supreme Court of Ohio and the Cuyahoga County Court of Appeals of the Eighth Judicial District aforesaid, commanding them and each of them to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court of Ohio in the case of "John M. Gilvary, plaintiff in error, vs. The Cuyahoga Valley Railway Company, defendant in error," being cause No. 23,947 in the Supreme Court and No. 12,597 in the Cuyahoga County Court of Appeals, to the end that the final decree and judgment of the said Supreme Court of Ohio and of said Court of Appeals may be reviewed by this Court as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate.

GLEN A. BOONE,
*Attorney for Petitioner.*

BERNSTEEN & BERNSTEEN,
M. L. BERNSTEEN,
J. E. MATHEWS,
*Of Counsel.*

THE STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

M. L. BERNSTEEN, being first duly sworn, says that he is one of the attorneys for John L. Gilvary and makes this verification for and in his behalf and is thereunto duly authorized; that he read the foregoing petition and that the allegations therein are true as he verily believes.

M. L. BERNSTEEN.

SWORN to before me and subscribed in my presence this 6th day of November, 1933.

(Notarial Seal) HANNAH FISHER,

*Hannah Fisher—Notary Public.*

I do hereby certify that I am a member of the Bar of the Supreme Court of the United States of America; that I have prepared and examined the foregoing petition and that in my opinion the petition is well founded, and the case is one in which the prayer of the petitioner should be granted by this Court.

GLEN A. BOONE.

# In the Supreme Court of the United States

**OCTOBER TERM, 1933.**

**No. .....**

JOHN L. GILVARY,
*Petitioner,*

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### AS TO CAUSES OF ACTION BY RAILROAD EMPLOYEES UNDER FEDERAL ACTS THE FEDERAL POWER IS EXCLUSIVE AND PARAMOUNT AND LOCAL COMPENSATION SCHEMES ARE NOT A DEFENSE.

#### (a) The Basis of the Federal Right.

The Federal Safety Appliance Act established a cause of action in favor of an injured railroad employee irrespective of the kind of commerce in which he was engaged at the time of such injury.

*Texas & Pacific Railway vs. Rigsby*, 241 U. S. 33:

Van Devanter, *J.*:

> "Without the express leave of Congress it is not possible, while the Federal legislation stands, to make or enforce inconsistent laws giving redress for injuries to workmen *, * * any more than laws prescribing the character of the appliances that shall be maintained." (P. 41.)

"Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensations because of their disregard of regulations established primarily for safeguarding commerce between the States is a matter within the control of Congress." (P. 42.)

"Liability to private suit is or may be as potent a deterrent as liability to public prosecution." (P. 42.)

"Remedial action in behalf of intrastate employees and travelers must either be governed by the Acts of Congress *or else be left subject to regulation by the several States, with probable differences in the law* material to its effect *as regulatory of the conduct* of the carrier." (P. 42.)*

**(b) Decisions Declaring the Paramount and Exclusive Nature of the Federal Right.**

*Ross vs. Schooley*, 257 P. R. 290 (Cert. Den. 249 U. S. 615), directly involved a conflict between a cause of action under the Federal Safety Appliance Act and a State system of compensation which was pleaded in bar of the action. The defense was rejected on grounds identical with those quoted from the opinion in *Railway vs. Rigsby, supra.*

*Ward vs. Erie Railway*, 230 N. Y. 230 (Cert. Den. 256 U. S. 696), holding that:

"The purpose of the Federal Safety Appliance Act was not merely to impose a duty but also to create or preserve a right of action for the damages, and the right of action so established is immune from impairment except by Act of Congress."

"Although he has no remedy under the Federal Employers' Liability Act, an employee of a railroad

* Italicized portions of quoted matter are emphasized by the writers of this brief.

engaged in interstate commerce who is injured while switching cars, not in aid of any interstate movement, has a right of action for his damages where the injury was caused through violation by the railroad of the Federal Safety Appliance Act, and the Workmen's Compensation Act of the State does not impair such right."

By Cardozo, *J.*:

"Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, should be dependent for its efficacy upon the pleasure of the States."

*Director General vs. Roland*, 265 F. R. 138 (C. C. A. 2), Manton, *J.*, held that no scheme of State compensation was available as a defense to a cause of action founded upon a Federal Safety Appliance Law. This holding is of additional significance in that it inferentially overrules a previous contrary decision by the same Court in *Railway vs. Peck*, 255 F. R. 261.

Every State decision upon the subject adopts the same doctrine:

*Kenna vs. Railway*, 284 Ill. 384;
*Kramer vs. C. & N. W. Ry.*, 148 Minn. 310;
*Southern Pacific Railway vs. Henderson*, 208 S. W. 561 (Tex.);
*Flannigan vs. Railway*, 108 Kan. 133;
*Miller vs. Reading*, 292 Pa. 44.

The above decisions are but a corollary of the general doctrine established in this Court, that the Federal power not only embraces interstate commerce as such, but such phases of intrastate commerce as are interwoven with or inseparable from interstate commerce:

*Southern Railway vs. Railway Commission*, 236 U. S. 439;
*Southern Railway vs. U. S.*, 222 U. S. 20;
*Houston, etc. Railway vs. U. S.*, 234 U. S. 342;
*Simpson vs. Shepard*, 230 U. S. 352;
*Stafford vs. Wallace*, 258 U. S. 495;
*Minnesota Rate Cases*, 230 U. S. 352, 399.

## II.

## THE SO-CALLED "ELECTION" BY GILVARY WAS INOPERATIVE UNDER THE ESTABLISHED DOCTRINE OF THIS COURT.

**(a) The States are without power to put the parties to an election in these circumstances:**

*Employers Liability Co. vs. Cook*, 281 U. S. 233;
*Erie Railway vs. Winfield*, 244 U. S. 170;
*Director General vs. Roland*, 265 F. R. 138 (Manton, J.).

**(b) The form or manner of assent is immaterial, whether it be expressed or implied, or whether based on a conclusive statutory presumption or the execution of a formal instrument:**

*Baizley Iron Works vs. Span*, 281 U. S. 222;
*Employers Liability Co. vs. Cook, supra*;
*Erie Railway vs. Winfield, supra.*

**(c) The actual "consent" signed by Gilvary when first entering the railroad's employ, under the provisions of the Ohio Statute (G. C. 1465-98) does not bear the construction that is claimed by the railroad, since it clearly indicates a purpose to leave untouched any Federal right of Gilvary.**

Of these in the above sequence:

(a) In *Employers Liability Co. vs. Cook, supra*, this Court (reversing the Federal Court of Appeals), definitely rejected the doctrine that employer and employee may, by

voluntary act, elect to vest a State Compensation Commission with power to adjudicate rights Federal in origin and nature. In that case the parties had formally submitted themselves, in advance of the accident, to the operation of the State Act. The employee was injured by a maritime tort. The Federal Court of Appeals in that case (31 F. 2, 497) followed the decision relied upon by the Railroad here (and presumably followed by the Cuyahoga County Court of Appeals), to-wit, *Berry vs. Donovan & Sons*, 120 Me. 457, and held that when the parties voluntarily submitted their future claims to the system of State compensation, a Federal liability would be included just as if it were a matter of local origin. The reversal of that decision by this Court was accompanied by the declaration that:

> "A State Workmen's Compensation Law, though elective in form, is not applicable in the case of an employee injured while unloading a vessel."

It would seem clear that the reversal of the Federal Court of Appeals decision, which relied upon and qualifiedly approved the principle of contract as advanced in the *Berry* case, is a rejection by this Court of any such doctrine. The error of the *Berry* case has been further demonstrated by the Court of Civil Appeals of Texas in *Bell vs. Southern Casualty Co.*, 267 S. W. Rep. 531. While the *Berry* case was a maritime case and was at no time an authority in favor of the Railroad's position here, it was the sole available decision tending to uphold the Railroad argument as to the asserted "contract," all of the directly applicable decisions, both State and Federal, being opposed to the Railroad view.

So, in the *Winfield* case, this Court held in the syllabus (244 U. S. 170):

> "The operation of the Federal Employers' Liability Act of April 22nd, 1908, (35 Stat. at L. 65, Chap. 149, Comp. Stat. 1916, Sec. 8657), governing the lia-

bility of interstate railway carriers for the death or injury of their employees while employed in interstate commerce, *cannot be interfered with by a state either by putting the carriers and their employees to an election* between the provisions of that statute and a state Workmen's Compensation Act, as is attempted by New Jersey Laws 1911, Chap. 95, *or by imputing such an election to them by a statutory presumption.*"

In *Director General vs. Roland, supra*, the Second Federal Court of Appeals held (Manton, *J.*):

> "It is beyond the power of any State to interfere with the operation of a Federal Act such as by putting carriers and their employees to an election between its provisions and those of the State acts, or imputing an election to them through a statutory presumption. The Federal Act is intended to operate uniformly in all the States as respects its application, rights and remedies conferred and is therefore paramount and exclusive."

Since the two judges of the Cuyahoga County Court of Appeals whose opinion finally emerged as controlling probably followed the repudiated *Berry* case, *supra* (there being no other theory advanced in the Railroad briefs), it is clear that the denial of Gilvary's Federal right was based upon a ground declared unsound by this Court.

The New York Appellate Division, in *Christenson vs. Morse Co.*, 214 N. Y. S. 734, a case of *actual* acceptance of partial benefits by the employee, adhered to the principles announced by this Court and held that the State Commission was without authority where the right involved was essentially maritime and hence Federal. The New York Court, as well as some of the State decisions cited *supra*, recognized that the recovery allowed under compensation systems was not in the course of the common law, being different in respect both as to substance and remedy; and this Court, in *Knickerbocker Ice Co. vs. Stewart*, 239 U. S. 149, held that to allow the States to apply variant

remedies for Federal liability would amount to a delegation of the power of Congress to the several States.

(b) Form of consent immaterial.

It will be apparent that all the above holdings are in consonance with the long line of decisions by this Court in maritime matters, where a conflict arose between the local compensation law and a Federal cause of action:

*Southern Pacific Railway vs. Jensen*, 244 U. S. 205;
*State Industrial Commission vs. Nordenholt Corp.*, 259 U. S. 263.

(Again holding that the presence or absence of "agreements" by the parties to be bound by the compensation law was immaterial.)

*Knickerbocker Ice Co. vs. Stewart*, *supra*.

This Court has held that the States may absorb both employer and employee into state compensation, either with or without their consent:

*Mountain Timber Co. vs. Washington*, 243 U. S. 219;
*Hawkins vs. Bleakley*, 243 U. S. 210;
*New York Central R. R. vs. White*, 243 U. S. 188.

Hence the argument that there is a difference between elective and compulsory compensation laws is of no force.

The consent of the parties or the exercise of a so-called "election" by them cannot transfer the jurisdiction of a Federal right to a State executive tribunal; and as already shown by the applicable decisions, the State cannot, by legislation, put the parties to an election as between the two organically different systems of law. In the *Cook* case cited *supra* it was said:

> "The State lacked power to prescribe the rights and liabilities growing out of the accident. The fact that the compensation law of the State was elective in form does not aid the respondents. *The employer did*

*not surrender rights guaranteed to him by the Federal law merely by electing to accept one of two kinds of liability in respect of matters within the State's control, either of which she had power to impose upon him.''*

The above quoted language embodies the controlling principle applicable to the case at bar. The two judges of the Cuyahoga County reviewing court were apparently unable to see that the "election" of Gilvary applied solely to one of two kinds of liability within the control of the State of Ohio, and did not embrace a liability beyond the control of that state. See also *Baizley Iron Wks. vs. Span, supra.*

(c) The actual "consent" signed by Gilvary when he entered the Company's employ was as follows: (Record, pages 52-53)

# THE INDUSTRIAL COMMISSION OF OHIO
## COLUMBUS, OHIO.

SECTION 51 OF COMPENSATION ACT
(Section 1465-98 G. C.)

The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

ACCEPTANCE AND NOTICE OF ELECTION BY EMPLOYER AND EMPLOYES UNDER SECTION 51 OF WORKMEN'S COMPENSATION ACT.

TO THE INDUSTRIAL COMMISSION OF OHIO:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and its undersigned employes, working only in this state, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, hereby elect that their respective rights and liabilities growing out of injury or death to such employes

or any of them, or their dependents in case of death, shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employes are engaged in intrastate commerce.

Said employer and employes hereby severally request the Industrial Commission of Ohio to approve their election to operate under the Workmen's Compensation Law of Ohio.

EMPLOYE: John Gilvary.

Oct. 12, 1928

The journal entry of the County Court of Appeals giving effect to this document was as follows (Record, pp. 4-5):

> "This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed, for the reason that the acceptance and notice of election by the employer and employee contract approved by the Industrial Commission of Ohio is a complete bar to a right of recovery in this action and is therefore contrary to law, and final judgment is hereby rendered for plaintiff in error; no other error appearing on the record, and this cause is remanded to said Court of Common Pleas to carry this judgment into execution. The defendant in error excepts."

Since the statute and the election are embraced in one instrument they are to be construed together. It is maintained:

> 1. The instrument expressly excludes any injury to Gilvary where a rule of liability or method of compensation was declared by Congress, and insofar as not forbidden by any Act of Congress.

2. The reference to injury in intrastate commerce manifestly meant injuries which did not involve infractions of Federal law and did not bring the State machinery into conflict with the Federal right.

3. The work at which Gilvary was engaged (although an intrastate movement) was so intimately connected with interstate commerce as to bring him within the protection of Federal law. This protection was precisely the same, so far as the Federal Safety Appliance Act was concerned, as if he had been in interstate commerce. The language of the consent by the parties only sought to include their "*mutual connection with intrastate work*" *where it was* "*clearly separable and distinguishable from interstate commerce.*" Since Congress, by statute, and this Court, by decision, have embraced Gilvary's intrastate activity under the same protection given interstate commerce employees, it is clear that the Ohio statute and the consent drafted thereunder expressly exclude an injury in circumstances that are not "clearly separable and distinguishable from interstate commerce."

4. Since the Ohio statute sought to exclude all exercise of state jurisdiction where "forbidden by any Act of Congress," the exercise by Congress of its power over the agencies, human and mechanical, of intrastate commerce as shown by the Federal Safety Appliance Act, was in legal effect a prohibition to the States to interfere in that field.

> "Inhibitive action by Congress is not essential to exclude action of the States as to interstate commerce. It is sufficient if the Acts of Congress occupy the field of regulation."
>
> *Southern Railway vs. Reid*, 222 U. S. 424;
> *Ward vs. Erie Railroad*, 230 N. Y. 230.

## CONSEQUENCES OF UPHOLDING THE DECISION OF THE OHIO COURTS.

If the decision of the State court is to be accepted as the law the following results will accrue:

1. The Federal cause of action and the measure of damages provided therefor will be absorbed into variant State schemes of compensation or may be otherwise subjected to modification.

2. The "punitive sanction" of a civil liability which was stressed in the opinion in the *Rigsby* case will pass from Federal to State control.

3. The right of railroads to defend against claims of safety appliance violations by interposing all proper defenses, including contributory negligence, will be removed and such cases, whether the railroad is at fault or not, will become a basis for some form of State compensation. This is a complete overturning of the law as it now exists in the several States where railroads are within workmen's compensation as to intrastate business.

4. Both employer and employee can hereafter be "put to an election" as between Federal rights (or defenses) and State rights (or defenses), in open disregard of the doctrines of this Court, clearly stated and repeatedly applied.

5. If the element of "consent" or "voluntary submission" is to be a determining factor in the abandonment of Federal rights (or defenses) in Federal Safety Appliance cases, then a like result must obtain as to other Federal rights, especially those under the Federal Employers' Liability Act and under maritime law. This requires that the doctrine of the several cases hereinbefore cited should, as a matter of consistency, be overruled.

6. The substitution of a State system of adjudication and compensation with respect to a Federal right, remedy

and defense would produce the lack of uniformity denounced in the cases cited; would constitute a delegation of legislative power by Congress to the several States; would clothe subordinate executive State tribunals with judicial power over such subjects and would enable employers to stipulate against their non-observance of Federal Safety Appliance regulations by substituting, for the full liability imposed by Federal law, a modified and partial award computed upon an actuarial basis and having no reference to the loss sustained by a given injured employee.

Respectfully submitted,

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J. E. MATHEWS,
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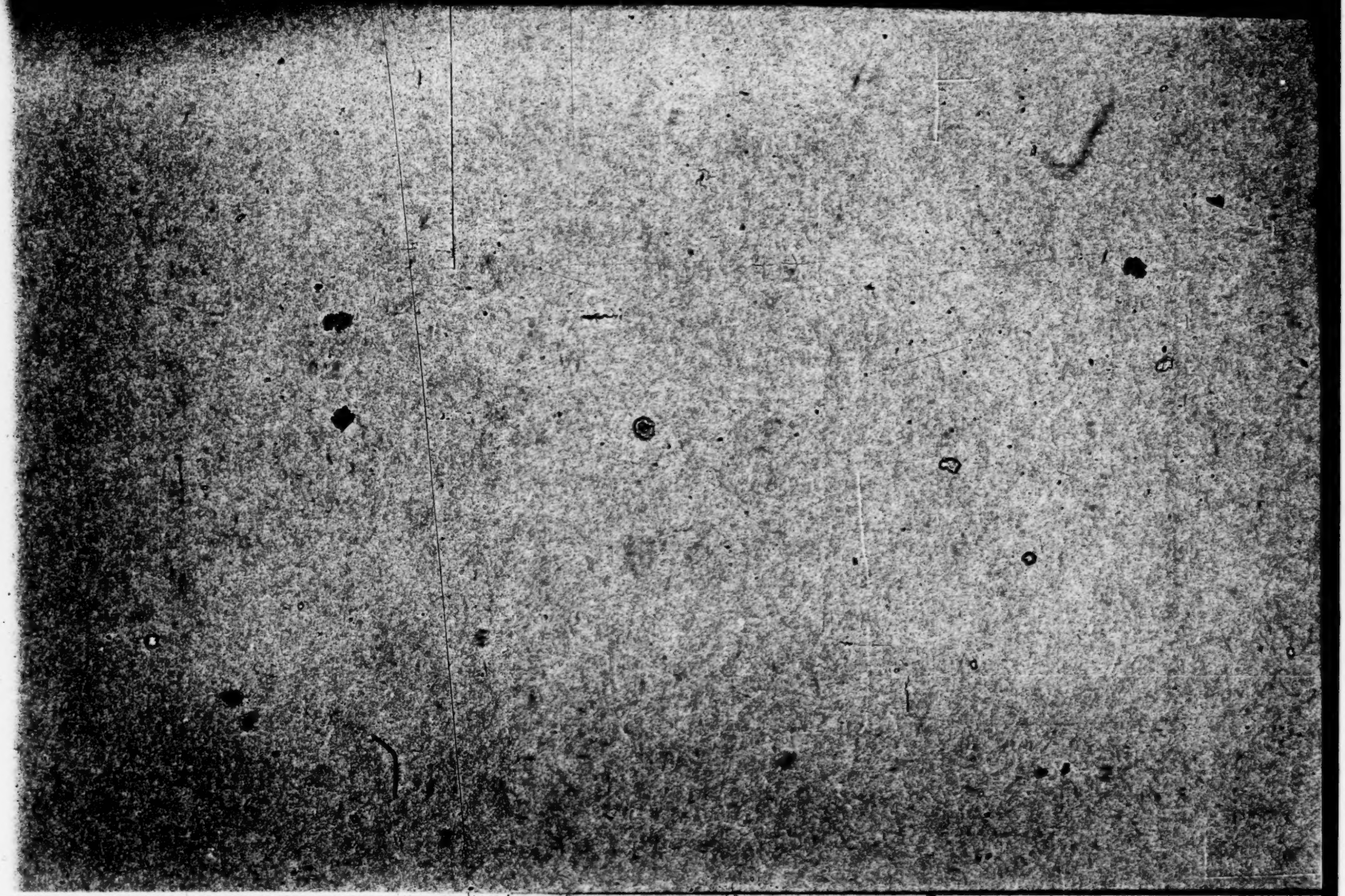

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# In the Supreme Court of the United States

OCTOBER TERM, 1933.

## No. 575.

JOHN L. GILVARY,
*Petitioner,*

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## BRIEF FOR PETITIONER.

GLEN A. BOONE,
*Attorney for Petitioner.*

BERNSTEEN & BERNSTEEN,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## BRIEF FOR PETITIONER.

This case is here on a writ of certiorari granted on the 11th day of December, 1933, directed to the Supreme Court of Ohio and the Court of Appeals of Cuyahoga County, Ohio.

### BRIEF OUTLINE OF CASE IN OHIO COURTS.

Petitioner, herein called Gilvary, sued the Railroad in the Court of Common Pleas of Cuyahoga County, Ohio, and recovered a judgment, his action being based on a violation of the coupler section of the Federal Safety Appliance Act. On error the Court of Appeals of Cuyahoga County, by a majority decision, reversed this judgment and entered final judgment for the Railroad upon the sole ground that a so-called election or acceptance signed by Gilvary at the time of entering the company's employ subjected him to the Compensation Act of the State and barred his Federal right of action. In the highest court of the State, the Supreme Court of Ohio, six judges participating, there was an equal division, which under Article 4, Section 2 of the State constitution operated as an affirmance of the

judgment of the Court of Appeals. By statute in Ohio, the Court of Appeals is required to pass upon all assignments of error and as appears from the journal entry that Court overruled all other assignments of error. The judgment therefore rests exclusively upon the theory that the Federal right asserted by Gilvary was barred by the State statute and the alleged election or acceptance. The text of the journal entry appears at page 50 *infra* and the election and the statute at page 5 *infra*. There is no claim in the case that Gilvary applied for or received compensation. There was no dispute as to the Railroad being a highway of interstate commerce or that Gilvary was injured while on duty as a result of being between the cars in the act of attempting a coupling. The immediate movement of cars at the time of the injury was in intrastate commerce but the cause of action on which Gilvary recovered his judgment rested upon a violation of the Federal Act, a copy whereof is set forth in the Appendix.

## OPINIONS OF LOWER COURTS.

Aside from the journal entries in the Court of Appeals and in the Supreme Court, there is no expression of opinion from the Courts of the State as to the basis of their holding. The vital part of the journal entry in the Court of Appeals reads:

> "and the judgment of the Court of Common Pleas is reversed for the reason that the acceptance and notice of election by the employer and employee contract approved by the Industrial Commission of Ohio is a complete bar to a right of recovery in this action and is therefore contrary to law and final judgment is hereby rendered for plaintiff in error (Railroad); no other error appearing on the record * * * Exception."

The entry in the Supreme Court of Ohio contained only a declaration of affirmance, with no statement beyond the fact of an equal division of opinion. (Page 50 *infra*.)

## GROUNDS OF JURISDICTION.

Jurisdiction to review this cause on certiorari exists under Judicial Code Section 237(b) as amended by Act of February 13th, 1925, Chap. 229, Sec. 1, 43 Stat. 437, the plaintiff below having based his right of recovery upon a statute of the United States (Section 2, Title 45 U. S. Code) which claim was denied and his rights held to be subject to the provisions of a State statute (G. C. 1465-98) as the exclusive measure of his rights.

## GROUNDS OF CERTIORARI.

To avoid duplication of statement, the grounds upon which certiorari was sought, and the propositions of law submitted herein will be stated together:

### I.

**An employee of an interstate railroad who is injured by a violation of the automatic coupler section of the Federal Safety Appliance Act while attempting a coupling between the cars has a cause of action under said Act, although the movements of such cars was intrastate in character. Such cause of action is not subject to impairment or modification by the Compensation systems of the States.**

### II.

**The States are without power to put either the employer or employee in such case to an election as between Federal rights, defenses and remedies, and such rights, defenses and remedies as may be embraced in a State scheme of compensation, and no such election, whether its form be express or implied, will be operative as against the assertion of the Federal right, defense or remedy.**

## III.

**A written "election and acceptance" by an interstate railroad employee purporting to subject him to a State scheme of compensation, which writing refers to injuries "in intrastate commerce" but contains no reference to causes of action arising under Federal law and expressly limits its operation by the words "and so far as not forbidden by any Act of Congress," and by further words requiring that the work covered by such submission be "clearly separable and distinguishable from interstate commerce," does not constitute a defense to an action based upon the coupler section of the Federal Safety Appliance Act, notwithstanding the immediate movement in which such employee was engaged was intrastate in character.**

## SUMMARY OF EVIDENCE AND ISSUES AT TRIAL.

The petition was based upon the Federal Safety Appliance Act by express reference, and alleged that Gilvary was injured as a direct and proximate result of being compelled to go between the cars because they had defective couplers that would not couple automatically by impact. There were other specifications of negligence contained in the petition but these were withdrawn at the trial, leaving the single issue as to the defective couplers. The answer (R. p. 12) set out three defenses, a general denial, assumption of risk and the operation of the Ohio Compensation Law. The trial Court withdrew both the second and third defenses from the jury, thus following the injunction of Section 8 of the Safety Appliance Act which bars such second defense and as to the third defense likewise following the various Federal decisions cited *infra*, holding that Workmen's Compensation Laws of the States are not a defense against suits based on Federal Safety Appliance Acts. (R. pp. 189-190.)

The election and acceptance upon which the Railroad based its defense consisted of a copy of the Ohio statute and of the language constituting the alleged submission by Gilvary at the time of entering the Railway's employ. It is as follows:—

"THE INDUSTRIAL COMMISSION OF OHIO,
COLUMBUS, OHIO.

SECTION 51 OF COMPENSATION ACT
(Section 1465-98 G. C.)

The provisions of this Act shall apply to employers and their employees engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this State, with the approval of the State liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

ACCEPTANCE AND NOTICE OF ELECTION BY EMPLOYER AND EMPLOYEES UNDER SECTION 51 OF WORKMEN'S COMPENSATION ACT.

TO THE INDUSTRIAL COMMISSION OF OHIO:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and

its undersigned employees, working only in this State, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, hereby elect that their respective rights and liabilities growing out of injury or death to such employees or any of them, or their dependents in case of death, shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employees are engaged in intrastate commerce.

Said employer and employees hereby severally request the Industrial Commission of Ohio to approve their election to operate under the Workmen's Compensation Law of Ohio.

.....

(Employer)

Employees: (Signed) JOHN GILVARY."

In support of his petition Gilvary submitted substantial testimony showing that he made a number of unsuccessful efforts to effect a coupling of the cars by the use of the mechanism supplied for that purpose; that he had many times coupled cars of different kinds at the same point on the track in question; that there was nothing in the curve or condition of the track that had ever hindered the ordinary coupling by impact in previous experiences. While there was conflict in the testimony, Gilvary was corroborated as to the number of attempted couplings by one of defendant's witnesses. As to the place of the accident and the extent of the curve (which the Railroad claimed was such as to excuse non-compliance with the rule of coupling by impact), Gilvary was corroborated by a Railroad witness who said that one of the cars was on the straight track

and that the couplers "were just about at the curve." There was no denial of Gilvary's testimony that, after the coupler on one of the cars failed to function, he was in the act of pulling the drawbar of the other car into proper alignment and had folded his arm around it for that purpose when the cars came together and crushed him. It was open to the jury to find as they did find, that the curve was either non-existent or so slight as to constitute no obstacle to the usual operation of couplers free from defect. (*Atlantic City Ry. vs. Parker*, 242 U. S. 56.) The Court of Appeals of Cuyahoga County, which has power under Ohio law to pass upon the weight of the evidence, reviewed this assignment of error and overruled it. The same observation may be made as to the Railroad's claim that there were tests made in the absence of Gilvary by persons in the company's employ. The record will show that there was an issue of fact as to whether the conditions existing at the time and place of such tests were the same as those obtaining at the time Gilvary was injured. It is not deemed proper to retail this testimony as part of the present brief. If it be the rule that this Court will consider the Railroad contention that the sufficiency of the evidence will be here reviewed, it is submitted that under the most recent decisions, especially *W. & A. R. R. vs. Hughes*, 278 U. S. 496; *Seaboard Air Line vs. Koennecke*, 239 U. S. 352; *San Antonio Ry. vs. Wagner*, 241 U. S. 476 and *P. & R. Ry. vs. Auchenbach*, 16 F. (2) 550, there was substantial testimony sustaining the position of plaintiff below.

# BRIEF.

## PROPOSITION I.

### CAUSES OF ACTION ACCRUING TO RAILROAD EMPLOYEES UNDER FEDERAL ACTS ARE NOT SUBJECT TO STATE SYSTEMS OF COMPENSATION.

A somewhat extended quotation from the leading decision of this Court on this subject seems warranted by the issues in the case, and the rulings of the State Courts. This Court held, in *Texas & Pacific Railway vs. Rigsby*, 241 U. S. 33, as follows:—

> "Syllabus 1. A switchman in the employ of an interstate railway company who was injured through a defect in a hand hold or grab iron forming one of the rungs of a ladder on a box car which he was descending after having set a brake operated from the roof of such car is within the protection afforded by the Safety Appliance Act of March 2, 1893, as amended by the Act of April 14, 1910, Section 2, which commands that all cars requiring secure ladders shall be equipped with them.
>
> Syllabus 2. An employee of an interstate railway company, *though not himself engaged in interstate commerce*, is within the protection of the Federal Safety Appliance Acts of March 2, 1893, March 2, 1903 and April 14, 1910, which impliedly create a private right of action in favor of an employee injured through a violation of the commands of those statutes that certain safety appliances be installed upon railway cars *used upon a highway of interstate commerce*."

The opinion thus deals with the subject (Pitney, *J.*):

> Page 41. "In the exercise of its plenary power to regulate commerce between the states, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. *Congress having*

*entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject matter is excluded.** *Southern Ry. Co. vs. Railway Commission*, 236 U. S. 439. Without the express leave of Congress, *it is not possible*, while the Federal legislation stands, *for the States to make or enforce inconsistent laws giving redress for injuries to workmen* or travelers occasioned by the absence or insecurity of such safety devices, *any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them*; for the consequences that follow a breach of the law are vital and integral to its effect as a regulation of conduct, *liability to private suit is or may be as potent a deterrent as liability to public prosecution*, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. *Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the states is a matter within the control of Congress*; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce—a discrimination certainly not required by anything in the Constitution,—*remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several states, with probable differences in the law material to its effect as regulatory of the conduct of the carrier.* We are therefore brought to the conclusion that the *right of private action* by an employee in-

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* The italics in this brief are those of petitioner unless otherwise indicated.

jured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the act as a regulation of commerce between the states that it is within the constitutional grant of authority over that subject."

The case of *Southern Railway vs. United States*, 222 U. S. 20, involved the power of the Federal government, by civil action, to recover penalties for the violation of the Safety Appliance Acts of Congress against an interstate railroad where the use of the cars was in intrastate commerce. It was there stated, (Van Devanter, *J.*):

> "* * * its (Congress') power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it."

After pointing out that the movement and safety of intrastate and interstate commerce are interdependent, and therefore not independent, the Court said:

> "Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or *results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains.* And so the absence of appropriate safety

appliances from any part of any train is a menace not only to that train, but to others."

The case of *Southern Railway Company vs. Railway Commission*, 236 U. S. 439, cited in *Railroad vs. Rigsby, supra*, involved the power of the states to enact any type of regulatory statutes related to safety appliances upon railroad cars engaged in intrastate commerce. The opinion in that case sets forth with great clearness the basis upon which the Federal government is entitled, because of the organic indivisibility of the subject, to exercise its exclusive power over the equipment, construction and appliances of railroad cars. The opinion reads in part as follows (Lamar, *J.*):

> "But the principle that the offender may, for one act, be prosecuted in two jurisdictions, has no application where one of the governments has exclusive jurisdiction of the subject matter, and therefore the exclusive power to punish. Such is the case here where Congress, in the exercise of its power to regulate interstate commerce, has legislated as to the appliances with which certain instrumentalities of that commerce must be furnished in order to secure the safety of employees. Until Congress entered that field, the states could legislate as to equipment in such manner as to incidentally affect, without burdening, interstate commerce. *But Congress could pass the safety appliance act only because of the fact that the equipment of cars moving on interstate roads was a regulation of interstate commerce. Under the Constitution the nature of that power is such that, when exercised, it is exclusive, and ipso facto supersedes existing state legislation on the same subject.* Congress, of course, could have 'circumscribed its regulations' so as to occupy a limited field. But so far as it did legislate, the exclusive effect of the safety appliance act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. *The states*

*thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties.''*

Quoting further from the opinion:

"* * * it is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. The principle is too well established to require argument."

The opinion further states:

"The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control."

Following upon the *Rigsby* case came the decision in *Ross vs. Schooley*, 257 F. R. 290 (cert. den., 249 U. S. 615), which was the first decision involving direct conflict between a system of workmen's compensation existent in the state and a cause of action brought under the Safety Appliance Law. The defense in the case was grounded upon the assumed bar imposed by the local compensation law. The opinion as to this point reads as follows:

"Inasmuch as the Congress has created the liability for damages for injury or death resulting from violation of the Safety Appliance Act, no state legislation can alter or impair the Federal right by passing compensation acts.

It is immaterial whether the injured employee was at the moment engaged in interstate or intrastate commerce, because the congressional power that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employees and travelers, regardless of their participation in interstate commerce. A state legislature, therefore, has no more

power to curtail the Federal right of an employee than of a traveler.

What effect a state compensation law has upon a right under the Safety Appliance Act of an employee, who was injured through defective appliances, while coupling intrastate cars on an interstate railroad, has not been directly involved in any case in the Supreme Court cited by counsel or found by us. But our conclusion, which rejects a result that would make the operativeness of the Act dependent upon the legislative wills of the several states, and which aligns that Act with the Employers' Liability Act in substantive and procedural effect, is supported by our understanding of *Schlemmer vs. Buffalo, etc. Ry. Co.*, 205 U. S. 1, and other cases cited."

The most important State decision is *Ward vs. Erie Railroad*, 230 N. Y. 230 (Cert. Den. 256 U. S. 696), the syllabus of which reads in part as follows:—

"1. The purpose of the Federal Safety Appliance Act was not merely to impose a duty but also to create or preserve a right of action for the damages, and the right of action so established is immune from impairment except by Act of Congress.

2. Although he has no remedy under the Federal Employers' Liability Act, an employee of a railroad engaged in interstate commerce who is injured while switching cars, not in aid of any interstate movement, has a right of action for his damages where the injury was caused through violation by the railroad of the Federal Safety Appliance Act, and the Workmen's Compensation Act of the State does not impair such right."

In the opinion of the Court (Cardozo, *J.*), there is this further statement:

"Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, should be dependent for its efficacy upon the pleasure of the States."

In *Director General vs. Ronald*, 265 F. R. 138 (C. C. A. 2, Manton, *J.*), the Federal Court of Appeals, inferentially overruling its previous contrary decision in *Railway vs. Peck*, 226 F. R. 261, held that the local workmen's compensation law of the State was not available as a defense against a cause of action founded upon the Federal Safety Appliance Law. The opinion reads in part as follows:

> "No scheme of compensation such as was embraced in the local workmen's compensation law of the State was available as a defense against a cause of action founded upon the Federal Safety Appliance Law."

The highest Courts of several States have rendered like rulings:

*Kenna vs. Railway*, 284 Ill. 384;
*Kramer vs. C. & N. W. Ry.*, 148 Minn. 310;
*Southern Pacific Railway vs. Henderson*, 208 S. W. 561 (Tex.);
*Flannigan vs. Railway*, 108 Kan. 133;
*Miller vs. Reading*, 292 Pa. 44.

In *Kenna vs. Railway, supra*, which involved an elective compensation law, the syllabus reads as follows:

> "The Federal Safety Appliance Act applies to an employee of an interstate railroad, though he is not engaged in interstate commerce, and excludes the application of the Workmen's Compensation Act in all cases in which the former Act is applicable, as the compensation act would constitute not only a different remedy for the employee but also a different thing for him to recover, the right of recovery under the Federal act being compensatory damages for the loss sustained and not for a sum based on wages earned."

At page 308 the opinion reads as follows:

> "It is conceded that the Federal Employers' Liability Act excludes the application of the Workmen's

Compensation Act in all cases in which the former Act is applicable. (*N. Y. C. vs. Winfield*, 244 U. S. 147.) The Safety Appliance Act is equally exclusive."

In *Kramer vs. C. & N. W. Ry.*, 148 Minn. 310, the plaintiff's decedent was injured in Michigan while engaged in an intrastate train movement, but brought his action against the defendant in Minnesota based on the violation of the Safety Appliance Act. The defendant interposed the Workmen's Compensation Law of Michigan as a defense, said Michigan act being elective. The syllabus reads as follows:

> 4. A recovery in an action based on the Safety Appliance Act is not prevented by the Workmen's Compensation Act of the State where the accident occurred, though in terms applicable, and though the train movement was intrastate.

The opinion reads in part as follows, stating that the question was:

> "Whether, if the deceased was engaged in intrastate commerce and was killed by a failure of the defendant to observe the Safety Appliance Act, a recovery in an action based on the statute is prevented by the Workmen's Compensation Act of Michigan, where the accident occurred, the Compensation Act being in terms applicable and the deceased subject to it?
>
> It is claimed that since the deceased was engaged in intrastate commerce, compensation is to be had under the Compensation Act of Michigan, and that an action based on the Safety Appliance Act does not lie. This question was considered in *Ross vs. Schooley*, 257 Fed. 290, before cited. The conclusion was that the Workmen's Compensation Act did not prevent a recovery for death caused by a violation of the Safety Appliance Act in an appropriate action founded on the statute, though the Compensation Act was in terms applicable and the deceased subject to it. *Taking the case as controlling, the same result follows here.*"

In *Southern Pacific Railway vs. Henderson*, 208 S. W. 561 (Texas Civil Appeals, 1919), the plaintiff was injured in California while engaged in intrastate commerce, but brought his action against the defendant in Texas. The defendant interposed the Workmen's Compensation Law of California as a defense, said Compensation Act being elective. The defendant contended that the courts of Texas had no jurisdiction; that the injury was sustained in California and that Henderson was engaged in intrastate commerce; that the California Workmen's Compensation Act gave the Industrial Accident Board exclusive jurisdiction. The syllabus reads as follows:

> 1. In a servant's action for injuries based on the defendant railroad's violation of the Federal Safety Appliance Act, the master's liability was enforcible in courts of Texas without reference to the laws of California where the tort occurred.

The Court said, in its opinion, as follows:

> "Plaintiff alleged and proved violation of the Federal Safety Appliance Act as the proximate cause of his injuries. This was the only ground of negligence submitted in the charge. In this condition of the record the Court properly gave the instruction complained of. Under the pleadings, evidence and charge, plaintiff's right of recovery was bottomed upon the Safety Appliance Act, and the California statute as to his right and remedy was without application."

To the same effect:

> *Ballard vs. Sacramento N. R. Co.*, 14 Pac. (2nd) 1045, (Decided Oct. 1932).

It would seem that the foregoing authorities should have been accepted as conclusive of the question presented. Since they were not so accepted by a sufficient vote in the Courts of the State and since the Railroad is insistent that the Federal power is subservient to that of the State in

respect to the subject matter, it is appropriate to set forth the further authorities available on the question of the exercise of Federal power over intrastate matters.

In *Houston etc. Ry. vs. United States*, 234 U. S. 342, it was held:

Syllabus 1:

> Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse *from being used in their intrastate* operations to the injury of interstate commerce.

Syllabus 2:

> Congress has the power to control the *intrastate rates* maintained by a carrier under State authority to the extent necessary to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves.

Syllabus 4:

> The authority of the Interstate Commerce Commission to remove discriminations against interstate traffic under the Act of February 4, 1887, includes the power to control the *intrastate rates* maintained by a carrier under State authority to the extent necessary to remove the resulting unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves, notwithstanding the proviso in Section 1 of that Act, that its provisions shall not apply to purely intrastate traffic.

The opinion of Hughes, *J.*, for the Court, reads as follows:

> "Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement'; (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety'; (*Mobile County vs.*

*Kimball*, 102 U. S. 691, 696, 697); 'to foster, protect, control, and restrain'; (*Second Employers' Liability Cases—Mondou vs. New York, N. H. & H. R. Co.*, 223 U. S. 1, 47, 53; 54). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. *The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule*, for otherwise Congress would be denied the exercise of its constitutional authority, *and the State, and not the Nation, would be supreme within the national field.*"

The opinion reviewed *B. & O. R. R. vs. Interstate Commerce Commission*, 221 U. S. 612, where the argument against the Hours of Service Act centered upon the invasion of the field of intrastate employment. That case—

"involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employees so that those who were engaged in

interstate commerce should be confined to that commerce exclusively. Employees dealing with the movement of trains were employed in both sorts of commerce; but the Court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations."

The Court also noted the decision in *Southern R. R. vs. United States*, 222 U. S. 20, upholding the amendment of 1903 to the Safety Appliance Act, from which quotation has been made, *supra*.

In the *Second Employers' Liability Cases*, 223 U. S. 1, the Court, upholding the present Federal Act upon the subject of railway employees, used the following language (Van Devanter, *J.*):

"As is well said in the brief prepared by the late Solicitor-General: 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. *If the agents or instruments are destroyed* while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will

prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. *Therefore, Congress may legislate about the agents and instruments of interstate commerce,* and *about the conditions under which those agents and instruments perform the work* of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the Interstate Commerce Act.' "

If it be claimed that the State has some form of reserved power in applying the Workmen's Compensation Law to a Federal subject matter upon the theory that a favor is being conferred upon the employee, the answer is found in *Charleston, etc. Railway vs. Varnville Furniture Co.*, 237 U. S. 597, 59 L. ed. 137, holding that when Congress has taken jurisdiction of the particular subject matter

"coincidence is as ineffective as opposition and a State law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

The principle of the *Houston* case, *supra*, is again applied in *New York, etc. vs. United States*, 257 U. S. 591, where discriminatory intrastate rates were the subject of a Federal order, which this Court upheld.

Closely allied to the principle under examination is that under which the States are excluded from the exercise of authority over a subject as to which Congress has enacted proper legislation.

In *Napier vs. Atlantic Coast Line R. Co.*, 272 U. S. 606, it was held:

Syllabus 1:

Congress may regulate locomotive equipment used in a highway of interstate commerce so as to preclude state legislation.

Syllabus 4:

The power conferred upon the Interstate Commerce Commission by the amendment in 1924 of the Boiler Inspection Act, to prescribe requirements and establish rules to enforce compliance with the requirements that locomotives, boilers, tenders, and all parts and appliances thereof, are in proper condition and safe to operate, occupies the entire field so as to exclude state power to require automatic doors to fire boxes, and cab curtains.

Also in *New York Central R. R. Co. vs. Winfield*, 244 U. S. 147, this Court held:

Syllabus 2:

Nothing in the Federal Employers' Liability Act points to any purpose to leave the states free to require compensation from an interstate carrier for injuries to its employees where the act withholds it.

Syllabus 5:

If Congress have constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, state legislatures have no right to interfere, and by way of complement to the legislation of Congress to prescribe additional regulations for what they deem auxiliary provisions for the same purpose, for in such cases the legislation of congress in what it does prescribe manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.

Syllabus 6:

The Federal Employers' Liability Act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability, it being a regulation of the carriers' duty or obligation as to both, and the reasons which operate to prevent the state from dispensing with compensation where the act requires

it equally prevent them from requiring compensation where the act withholds or excludes it.

Opinion p. 685 (Van Devanter, *J.*):

"Only by disturbing the uniformity which the act is designed to secure, and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg vs. Pennsylvania*, 16 Pet. 539, 617:

> 'if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it.'

Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both."

Further, in *Michigan Central R. Co. vs. Vreeland*, 227 U. S. 59, it was said in the Opinion, by Lurton, *J.*:

"Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample.

> * * * By this Act (Federal Employers' Liability Act) Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states. * * * It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states."

To the same effect, *Southern Ry. vs. Ry. Com.*, 236 U. S. 439.

Recurring to the immediate subject of inquiry, attention is called to the scope of Federal action under the form of Safety Appliance regulation. Since 1903 carriers are obligated to comply with direct statutory enactment or with orders of the Interstate Commerce Commission upon the following subjects, irrespective of the question of intrastate commerce: train brake or air brake systems; automatic couplers; grab irons; hand holds; height of draw bars. By the amendment of 1910 uniformity of safety appliances was sought to be attained and further provisions were added as to sill steps, hand brakes, ladders, running boards, etc. By this exercise of power the field of Federal control was greatly enlarged and the number of employees in both interstate and intrastate commerce who are brought within the protection of the Act is very considerably increased. The Interstate Commerce Commission was empowered to issue standardizing orders after hearings. It may be noticed parenthetically that whereas the original Act was silent as to the cause of action founded upon it, as declared in the *Rigsby* case, (except for the reference to non-assumption of risk) the amendment of 1910, section 4,

contained the provision that if a disabled car were being hauled to a place of repair (as it might be without penalty), the carrier should not thereby escape "liability to any remedial action for the death or injury of any railroad employee." (See Appendix page 41 herein.)

Thereafter the Federal departments continued to exercise the authority conferred and the order of the Interstate Commerce Commission of 1911 covered the subject comprehensively as to the number, location, dimensions and manner of application of sill steps, hand holds, brakes, etc. upon almost all forms of rolling stock and locomotives. From these considerations it is obvious that unless the doctrine of *Railway vs. Rigsby* is to be departed from, the penalties and the "potent deterrent by civil action" referred to in that decision have constituted and still constitute a powerful stimulant to law observance on the part of the carriers. The present case is the first example of an effort to substitute for the liability heretofore recognized and imposed, a new and modified form of responsibility to be determined and administered by an administrative tribunal of a State and otherwise than according to the course of the common law. It must be remembered that at the time of the enactment of the original Act as well as at the time of the first amendment in 1903, Congress could not have had in contemplation any such modification of its legislation as is here attempted to be justified. At those dates Workmen's Compensation Acts were not known. The remedy, and the only remedy, which Congress had in legal contemplation was one according to the course of the law. Since it has been declared by this Court that the principle of Workmen's Compensation is not according to the course of the common law (*Southern Pacific vs. Jensen*, 244 U. S. 205), it cannot reasonably be asserted that that form of compensation was in contemplation or that it constitutes a "punitive sanction" within the meaning of the opinion in *Railway vs. Rigsby*.

The contention of the Railroad in the instant case is in effect that the Federal protection for the human agency is not co-extensive with Federal authority over the mechanical agency; that although an employee is injured by a violation of a Federal statute or order, which violation is subject to penalty under the criminal section of the Act, notwithstanding that the movement is wholly in intrastate commerce, yet as to the civil consequences the States are clothed with power to intervene and substitute their own provisions for those established by Congress and by this Court in its various interpretations of the Federal Act. Such a result manifestly will do violence to the numerous decisions here cited. It will constitute an amendment of a Federal Act by State legislation. It will be a delegation of power to the states, as was held in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. It will produce the same degree and extent of disharmony and lack of uniformity in the enforcement of Safety Appliance Acts that was denounced as a danger in *New York Central R. R. vs. Winfield, supra*, with respect to the Federal Employers' Liability Act. And from the viewpoint of the carrier it embraces in the scheme of compensation not only the cases where the carrier is liable but the cases where it is not. While the employee cannot directly urge the grievance of his employer, yet since the instant litigation rests upon the theory of contract advanced by the defendant below, if the contract is void because of the absence of power on the part of the State to enact the statute which supports it, the petitioner should not be regarded as remaining bound. Within the authority of *New York Central Railroad vs. Winfield, supra*, it is submitted that no State has power to establish a system under which carriers, against which no liability exists (as in cases of safety appliance injuries caused by Act of God, by inevitable accident or sole fault of the employee), can be subjected to a liability where the Act

withholds it. And if it be urged that where the carrier has voluntarily "by contract" elected to avail itself of such a local system of law, the answer will be found in the decisions of this Court in a later section of this brief showing conclusively that no State has power to exact or provide for such election.

## II.

## THE STATES ARE WITHOUT POWER TO PUT THE PARTIES TO AN ELECTION SUCH AS WAS EXACTED IN THE INSTANT CASE.

This phase of the argument is likewise controlled by authority. With relatively unimportant exceptions every case in this Court and in the lower Federal and State Courts has recognized that the states are not empowered to put employer or employee to an election as between a Federal right, remedy or defense, on one hand, and a State-granted right, remedy or defense on the other.

In *Director General vs. Ronald*, 265 F. R. 138 (C. C. A. 2—Manton, *J.*), it was held, inferentially overruling a previous contrary opinion by the same Court, that:—

> "It is beyond the power of any State to interfere with the operation of a Federal Act such as by putting carriers and their employees to an election between its provisions and those of the State acts, or imputing an election to them through a statutory presumption. The Federal Act is intended to operate uniformly in all the States as respects its application, rights and remedies conferred and is therefore paramount and exclusive."

Likewise, in *Erie Railway Co. vs. Winfield*, 244 U. S. 170, it was held:—

> "The operation of the Federal Employers' Liability Act of April 22nd, 1908, governing the liability of interstate railway carriers for the death or injury of their employees while employed in interstate com-

merce, cannot be interfered with by a State either by putting the carriers and their employees to an election between the provisions of that statute and a State Workmen's Compensation Act, as is attempted by New Jersey Laws 1911, Chap. 95, or by imputing such an election to them by a statutory presumption."

It should be noted that this syllabus covers two phases of the operation of becoming bound by the State law, to-wit:

"putting the carriers to an election"

which covers the case of voluntary action, or,

"imputing such an election to them by a statutory presumption."

Both operations fall equally afoul of the law. At page 173 the opinion of Mr. Justice Van Devanter reads, in part:—

> "This part is described as 'elective,' and is not to be applied unless the employer and the employee shall have agreed, expressly or impliedly, to be bound thereby and to surrender 'their rights to any other method, form, or amount of compensation or determination thereof.' Respecting the mode of manifesting such an agreement or the contrary, it is provided that 'every contract of hiring shall be presumed to have been made' with reference to this part of the statute, and, unless the contract or a notice from one party to the other contain 'an express statement in writing' to the contrary, it 'shall be presumed' that the parties 'have agreed to be bound' by this part of the statute."

It will be shown under a later caption that the basis of the decisions in the New Jersey Courts (which the above decision reverses) was the same elemental concept of contract which the Ohio reviewing Courts in the instant case seem to have followed and which the Railroad still urges.

This Court having held that State systems of compensation are valid whether voluntary or compulsory

(*Mountain Timber Company vs. Washington*, 243 U. S. 219; *Hawkins vs. Bleakley*, 243 U. S. 210; *New York Central vs. White*, 243 U. S. 188), it becomes of no moment whether the supposed contract is express or implied, or whether the relationship arises out of action or inaction, or is the result of a conclusive presumption. Such is the holding in the following cases:—

*Employers' Liability Corp. Ltd. vs. Cook*, 281 U. S. 233, deciding as follows:

> "State Workmen's Compensation Law, *though elective in form*, is not applicable in the case of an employee injured while unloading a vessel."

In that case the injury took place while the claimant was unloading a boat at Houston. Under the Texas law the compensation act is wholly elective as to both employer and employee and either might refuse to be bound thereby. Both had "elected" within the meaning of the local law. After holding that the claimant's employment was essentially within Federal cognizance, the Court declared that under the circumstances disclosed the State of Texas (McReynolds, *J.*)

> "lacked power to prescribe the rights and liabilities of the parties growing out of the accident. *The fact that the compensation law of the State was elective in form does not aid the respondents.* The employer did not surrender rights guaranteed to him by the Federal law merely by electing to accept one of two kinds of liability in respect of matters within the State's control, either of which she had power to impose upon him."

*Baizley Iron Works vs. Span*, 281 U. S. 222, where this Court held that the provisions of a local compensation act could not embrace an employee engaged in making repairs to a completed vessel lying in navigable waters. The case originated in Pennsylvania, where the statute declared, with reference to workmen's compensation, that:

> "There shall be a *conclusive presumption* that both employer and employee accept its provisions unless one of them makes written statement to the contrary."

Irrespective of the conclusive and final character of the consent which Span, the employee, was charged with by law, it was held that his remedy lay in admiralty and was enforcible by Federal law, and that he had no claim under the compensation law of the State.

Also, in the case of *Southern Pacific Co. vs. Jensen*, 244 U. S. 205, this Court held that the provisions of the local compensation act were not applicable to a stevedore engaged in unloading a vessel lying in navigable waters. The case originated in New York. The Court held that the compensation act of New York would not apply. The syllabus of this case reads in part as follows:

> "State legislation changing, modifying, or affecting the general maritime law which contravenes the essential purpose expressed by an Act of Congress, or works material prejudice to the characteristic features of such general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations, is invalid * * *."

It is of interest to note that the section of the New York Workmen's Compensation Law involved in the *Jensen* case is identical with Section 1465-98 of the Ohio General Code, under which the "election" was made in the instant case. The New York Court of Appeals had occasion to contend with the tortuous language of that section, and characterized it as "awkwardly phrased," 109 N. E. Rep. 600. This Court, without attempting to construe the peculiar wording of the statute, held that since the subject matter was of maritime, and hence Federal, cognizance, the compulsory scheme of State compensation was without effect upon the rights of the parties.

In *Knickerbocker Ice Co. vs. Stewart*, 253 U. S. 149, it was held that even an Act of Congress could not be allowed to invade the field of admiralty law by making available therein the provisions of State workmen's compensation laws, since that would destroy the uniformity contemplated by the Constitution.

In *Duart vs. Simmons*, 231 Mass. 313, it was held that:

> "Where an injury occurred while the plaintiff was employed in the discharge of a cargo of coal from a vessel lying in navigable waters, it was held that his work and injury were maritime in their nature, and that the Massachusetts Workmen's Compensation Act was inapplicable, notwithstanding the fact that the Act was elective, both with the employer and the employee."

The Court said, in its opinion:

> "The ground of the *Jensen* decision, as we understand it, is that the kind of legislation represented by workmen's compensation acts is beyond the jurisdiction of the States, so far as it relates to admiralty and maritime affairs. *The reasoning of that decision seems to us to apply equally to an elective as to a compulsory workmen's compensation act. Consent of parties cannot confer jurisdiction.* A statute which in its nature is outside the jurisdiction of the State, because within the exclusive domain of the Federal government, cannot confer rights or be a bar to the enforcement of common-law obligations."

The same principle was followed where the compensation act was elective or optional in the following cases:

*Neff vs. Industrial Commission*, 166 Wis. 126;
*Soderstrom vs. Curry and Whyte*, 143 Minn. 154;
*Thornton vs. Grand Trunk Ry.*, 202 Mich. 699;
*O'Brien vs. Scandinavian American Line*, 94 N. J. 244.

From these decisions it is, we believe, sufficiently evident that where the Federal Courts have indicated a purpose to preserve the uniformity of remedies for causes of action created by Federal enactment, it is not competent for the States, by any type of legislation or by the substitution of remedies of their own choosing, to set aside the Federal provision.

It is equally evident, we believe, that under said body of decisions there is no authority in the State, or any of its divisions, to require either the employer or employee to make an election as between the Federal remedy and that provided by the State.

The decisions as to admiralty jurisdiction present a flexibility admitting certain types of maritime injuries to be adjudicated under State law, which is totally absent from the decisions respecting liability under the Federal Safety Appliance Law. In the latter case we find an apparent determination to preserve the Federal remedy intact in a manner resembling or parallel to the principle which has been adopted as to the Federal Employers' Liability Law. It is noteworthy that the case of *New York Central R. R. vs. Winfield, supra*, was not based upon Section 5 of the Employers' Liability Act which voids all devices, etc., but upon the ground that when Congress had occupied the field any attempt on the part of the States to substitute a compensation system as a remedy was an interference.

In keeping with the foregoing decisions are those which base like holdings upon the strict principle of jurisdiction. In *Christenson vs. Morse Dry Dock Co.*, 214 N. Y. S. 734, five judges concurring, held that an attempted voluntary submission under Section 113 of the New York law (the counterpart of Section 1465-98 of the Ohio General Code here involved), would not confer jurisdiction upon the State Commission where the subject matter was maritime,

since the submission could not invest the tribunal with power even by consent. A like result was arrived at by the Supreme Court of Ohio, where a voluntary submission by maritime employees to the State Commission was held ineffective to clothe the Commission with any power over a matter essentially Federal in nature.

*State ex rel. vs. Duffy*, 113 O. S. 96 and 579. See, to the same effect; *Duart vs. Simmons*, *supra*.

Throughout the litigation of the instant case in the Courts of Ohio, counsel for the Railroad have rested their argument chiefly upon the doctrine of a contract relation between the employer and the employee based upon the "election and acceptance" document, (*supra*, page 5). This theory seems to have been carried into the journal entry already cited. The principal authority advanced in brief and argument in support of the view that the contractual feature of the writing effected a complete transfer of the employee from Federal to State control is *Berry vs. Donovan and Sons*, 120 Maine 457. That case decided that a longshoreman injured upon a wharf was within the State compensation system by virtue of a previous election under the compensation law of the State. The decision on the facts is entirely correct and in keeping with what this Court held in *State Industrial Commission vs. Nordenholt*, 259 U. S. 263, and many other cases. However, the Maine Court went far afield in stressing the contractual phases of the election (which this Court had uniformly treated as immaterial) and apparently believed that the jurisdiction sprang from the contract. Since this view evidently misled the Ohio Courts in the present case, it is important to recall that the principle has been definitely rejected by this Court, not only in general terms but by specific ruling.

In the case of *Employers' Liability Company vs. Cook*, cited *supra*, this Court reversed the holding of the Fifth

Court of Appeals (31 F. (2) 497), in which a majority of that Court, also influenced by the argument of contract, held that because the employee of the Ford Motor Company and the Company itself had by voluntary election become subject to the Texas Compensation Law, the redress of the injured employee must be sought under that law, even though the employment was essentially maritime. The Court placed reliance upon the Maine case in arriving at its conclusion, stating that—

> "any liability in this case arises out of a contract, the enforcement of which cannot affect any principle of the admiralty law."

We have already noted the reversal of this decision by this Court upon the ground that an election by the employer as between two kinds of local liability did not force him to surrender rights guaranteed to him under Federal law.

There is nothing novel in the argument that employer-employee relationships under compensation laws have a contractual base. This Court has reviewed other cases where this phase of the status of the parties was urged as a reason for transferring control from Federal to State cognizance. The idea was either directly involved or implicit in *New York Central R. R. vs. Winfield, supra*, and more particularly in *Erie Railroad vs. Winfield, supra*. In the latter case, the third question stated was:

> "Whether, by reason of the State statute *the carrier became bound contractually to make compensation in this instance* even though it came within the Federal Act."

In the State Court (88 N. J. L. 619) it had been held:

> "What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, *but a contractual obligation created by section 2 of our workmen's compensation act with the consent of both employer and*

*employee*, and which exists although no negligence can be imputed to the employer. And this we consider she is entitled to do in the absence of any averment by her, or any proof offered, or any admission made by the defendant company showing that the death of her decedent resulted from defendant's negligence, and thus created a liability against it under the Federal statute."

See also, *Hammill vs. Pa. Co.* (N. J. L. 1915) 94 Atl. 313, stressing the contractual element in compensation cases.

We need not repeat the ruling made in this Court upon the issue thus presented; nor need we stress the fact that there is no operative or practical distinction in the cases as between elective and compulsory compensation acts. The assent or election, whether based upon a presumption or upon inaction, or whether accomplished ritually, would still leave the parties exactly where the boundaries between Federal and State power have left them. No amount of solemnity in executing an election can leap across the divisions established between Federal and State powers, especially where there is involved the investing of State functionaries with powers emerging solely from the attempted compact of the parties themselves but not conferred by any law. This is believed to be one of the bases of the repeated statement in the above cited decisions of this Court that the form and manner of assent or election in these cases, whether by express agreement or otherwise, are immaterial.

It is the theory of this brief that the consistent denial, by this Court, of the right of the States to put employer or employee to an election as between Federal and State rights and remedies rests upon the ground of interference. This interference arises out of the practical operation of the process of "putting to an election." In many, if not all cases, election as prescribed or tendered by Compensa-

tion Acts consists of a choice between two remedies or statutory systems which are so devised as to present alternatives, one of which is made discriminatory and prejudicial in order to clothe the other with allurement. The removal of defenses, in the case of the employer, and the subjection to defenses, in the case of the employee, are the most familiar examples. It is clear that if such a tendering of a dilemma to parties were to be permitted to the States in respect of Federal rights, remedies or defenses, the coercive nature of such legislation could constitute a serious interference with the rights of the parties under the paramount law. While the consideration is legislative rather than judicial, it is not unimportant that under such a system of elections an employee could be brought to a complete surrender of all rights under Federal statutes as a condition of obtaining employment. But on the other hand, it is conceivable that the States might devise a system such that the employer could be placed at a disadvantage unless he too submitted to the State as against the Federal provision.

If the status of the parties as to Federal rights and remedies is susceptible of State control on the principle of contracts authorized by State law, then all States may by variant enactments make (if they have not already made) like provision with like results. Since there is no difference in principle between—

(a) An actual contract between employer and employee, or

(b) An implied contract grounded upon the incorporation of the statute, or

(c) A conclusive presumption of submission

(which is at best a mere adoption of the statute)

it follows that all States wherein Compensation Laws are in operation should be regarded as empowered to absorb large groups of rail employees into the State systems

without regard of the constantly broadening protection sought to be accorded them under the Federal Safety Appliance Act. . . .

Concluding this phase of the discussion, attention is called to a thorough repudiation of the contract principle of the Maine decision appearing in *Bell vs. Southern Casualty Co.*, 267 S. W. Rep. 531 (Tex. Civil App.), stating that the overwhelming weight of authority in this country was opposed to the principle of that decision.

## III.

## THE WRITING ACTUALLY INVOLVED IN THE CASE DOES NOT BEAR THE INTERPRETATION AS MATTER OF LAW THAT IS ASCRIBED TO IT, SINCE IT MAKES NO REFERENCE TO FEDERAL RIGHTS OR REMEDIES BUT ON THE CONTRARY EXPRESSLY EXCLUDES THEM.

For convenience in the examination of this proposition we again set out the language of the election and acceptance as signed by the employee:—

"THE INDUSTRIAL COMMISSION OF OHIO,
COLUMBUS, OHIO.

SECTION 51 OF COMPENSATION ACT

(Section 1465-98 G. C.)

The provisions of this Act shall apply to employers and their employees engaged in intrastate and also in interstate and foreign commerce, *for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate* and foreign *commerce*, and then only when such employer and any of his workmen working only in this State, with the approval of the State liability board of awards, *and so far as not forbidden by any act of Congress*, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

ACCEPTANCE AND NOTICE OF ELECTION BY EMPLOYER AND EMPLOYEES UNDER SECTION 51 OF WORKMEN'S COMPENSATION ACT.

TO THE INDUSTRIAL COMMISSION OF OHIO:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and its undersigned employees, working only in this State, whose mutual connection with *intrastate* work *is clearly separable and distinguishable from interstate* and foreign *commerce*, hereby elect that their respective rights and liabilities growing out of injury or death to such employees or any of them, or their dependents in case of death, *shall*

*be governed by the provisions of the Workmen's Compensation Law of Ohio* in all cases in which such injury or death is sustained while such employer or employees are engaged in *intrastate commerce;*

Said employer and employees hereby severally request the Industrial Commission of Ohio to approve their election to operate under the Workmen's Compensation Law of Ohio.

.....

(Employer)

Employee: (Signed) JOHN GILVARY,"

At the beginning it would be conceded that no contract, election or acceptance executed by the parties could be broader than the Act upon which it is based. In addition the election as written declares that it is subject to the provisions of the compensation law. Hence all limitations contained in the statute are incorporated in the election.

The basic limitation is that the election does not operate upon the activities of the parties, except where "their mutual connection with intrastate work is clearly separable and distinguishable from interstate commerce." Following this limitation is another: The election is to be allowed only such scope "as is not forbidden by any Act of Congress." A third phase of the law, and therefore of the election, is that where "a liability or method of compensation may be established by Congress" the operation of the local system is abrogated except where the work is clearly distinguishable from interstate commerce.

Literally read, the statute and the election contemplate the inclusion of employees in interstate commerce. (*Jensen* case, 109 N. E. 600.) It is possible that this language is an attempt to occupy the field left unoccupied by Congress, following the early decisions by the Courts of New York

and New Jersey. (*Cf. Erie Ry. v. Winfield, supra.*) In any event, it is submitted that the purpose of the statute and of the election as properly interpreted is to avoid any conflict with the Federal rights or defenses of the parties. Since there are manifest ambiguities in the wording, a Court having recourse to rules of construction would assume that it was not the intent of the legislature to invade a field beyond its jurisdiction. But even in the absence of the doubtful words of the Act, it is clear that it is not inclusive of that which a Federal statute forbids; and it requires no repetition of authority to show that the occupancy by Congress of a given field operates as an exclusion and prohibition upon the States with reference to the subject. The continuing power and control of Congress over the remedy for a violation of a Federal Act is itself a prohibition to the States as to further or other remedies.

If Gilvary had been injured in intrastate commerce without more, that is, with no involvement of Federal rights, it may be assumed that the Act would apply and that the Railroad would owe compensation even for non-negligent injury. But he was not injured in intrastate commerce in circumstances "clearly separable and distinguishable from interstate commerce." Quite the contrary, the injury was sustained in such relation to interstate commerce as that a Federal Act relative to that commerce was violated at the moment of the injury. To say that the intimacy of the relationship to interstate commerce was such as to support the Federal power over the mechanical appliance, but that the employee injured by the same delict must be regarded as engaged in a movement "clearly separable and distinguishable" from such commerce is manifestly untenable. And this is especially true when we are dealing with a document which is to be interpreted in the light of the Federal decisions on the subject of elections in such matters by employers and their em-

ployees. Since General Code of Ohio Section 1465-98 could not constitutionally put either the Railroad or Gilvary to an election as between local and Federal rights, defenses or remedies, any document such as this, procured from the employee upon his entering the employment of the Railroad, and executed long in advance of the injury, should be read so as to avoid a conflict between the State and Federal provisions, and the parts of such document seeking to avoid any such conflict should be given controlling effect.

Since the State courts gave to this writing an effect subversive of a Federal statute and of rights asserted by Gilvary thereunder, it is competent for this Court to give to this election and acceptance the interpretation which, as a matter of law, it bears, and to declare the rights of the parties in the light of that interpretation. The result should be the reversal of the judgment of the Supreme Court of Ohio and of the Court of Appeals of Cuyahoga County and the affirmance of the judgment of the Court of Common Pleas of Cuyahoga County in favor of John Gilvary vs. The Cuyahoga Valley Railway Company.

Respectfully submitted,

GLEN A. BOONE,

*Attorney for Petitioner.*

BERNSTEEN & BERNSTEEN,
M. L. BERNSTEEN,
J. E. MATHEWS,
*Of Counsel.*

## APPENDIX.

### THE FEDERAL SAFETY APPLIANCE ACTS.

AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Section 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in ac-

cordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. That within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Sec. 6. [As amended April 1, 1896.] That any such common carrier using any locomotive engine, running any

train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: Provided, That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this Act.

Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

AN ACT to amend an Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

Section 1. That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than

fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall except as specifically amended by this Act, apply to this Act.

AN ACT to supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

Section 1. That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

Sec. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Sec. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give

notice of such designation to all common carriers subject to the provisions of this Act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: Provided, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said Commission is hereby given authority after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission.

Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six:

Provided, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

Sec. 5. That except that, within the limits specified in the preceding section of this act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities,

or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this act.

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

## JOURNAL ENTRIES.

CUYAHOGA COUNTY COURT OF APPEALS.
December 28th, 1932. To Court:

This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed, for the reason that the acceptance and notice of election by the employer and employee contract approved by the Industrial Commission of Ohio, is a complete bar to a right of recovery in this action and is therefore contrary to law, and final judgment is hereby rendered for plaintiff in error; no other error appearing on the record, and this cause is remanded to said Court of Common Pleas to carry this judgment into execution. The defendant in error excepts. Levine, *Judge*, dissents. Journal 9, page 466.

SUPREME COURT OF OHIO.
October 25, 1933.

Error to the Court of Appeals of Cuyahoga County. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it appearing that the Judges of the Court are equally divided in opinion as to the merits of this case (one Judge not participating) and are for that reason unable to agree upon a judgment, and the entry of the fact constituting an affirmance of the judgment of the Court of Appeals, it is ordered that the defendant in error recover from plaintiff in error its costs herein expended, taxed at $.....; and it appearing to the Court that there were reasonable

grounds for this proceeding in error, it is ordered that no penalty be assessed herein. Ordered, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this Judgment into Execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County "for entry." J. No. 33, page 282.

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# In the Supreme Court of the United States

**OCTOBER TERM, 1933.**

## No. 575.

JOHN L. GILVARY,
*Petitioner,*

vs.

CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## REPLY BRIEF OF PETITIONER.

GLEN A. BOONE,
*Attorney for Petitioner.*

BERNSTEEN & BERNSTEEN,
M. L. BERNSTEEN,
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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## REPLY BRIEF OF PETITIONER.

### STATEMENT.

Believing that the controlling question in this case relates to the basic conflict between the State and Federal system of remedies, it is deemed preferable to defer discussion of the facts and evidence to a later place in the brief.

Accordingly, the first question taken up will be the position of the respondent as to the dominant issue.

### AS TO RESPONDENT'S CLAIM OF CONTRACT.*

1.

Throughout the respondent's brief the status of Gilvary is treated as that of an employe in intrastate commerce, in the strict and unmodified sense. The argument as made would be equally applicable if Gilvary had lost his arm in a repair shop while working on an intrastate

* This reply brief follows the index of respondent's brief with respect to numbering and lettering of paragraphs.

job and wholly removed from the operation of Federal legislation. The brief does not meet the question presented by the decisions cited by the petitioner, namely, *To what extent can a State control the rights of an employe of a railroad whose relationship to interstate commerce is sufficiently close to place him under the protection of Federal legislation.*

Avoiding repetition or restatement, the following statements of the respondent's position here are respectfully challenged as unsound.

(a) That the decision of the State Courts interpreting an Ohio contract drawn under an Ohio Statute is binding upon this Court. (pgs. 20-21 R. R. brief.)

This is untenable since the suit is based on a Federal Statute, the question is not local and this Court is not concluded by State decisions.

Judicial Code, Section 237;
*Seaboard Ry. vs. Horton*, 233 U. S. 492;
*No. Car. Ry. vs. Zachary*, 232 U. S. 253;
*Kan. City Ry. vs. Jones*, 241 U. S. 180;
*Railway vs. Reny*, 241 U. S. 288.

(b). That "it is fair to consider the benefits" acquired by the parties to the contract. (pg. 21 R. R. brief.)

This consideration is legislative and is entitled to no more weight than it received in the *Winfield* case. By the same principle the whole body of railroad workers could be brought within compensation laws. If railroads and other employers throughout the country are to be drawn into the local system of compensation with respect to Federal rights, it is evident that a vast problem is uncovered. No Court can know or determine upon which side lays the greater advantage to either of the involved groups. Far-

thermore, if a subject matter is Federal in nature the states are not empowered to enact supplementary legislation even though regarded as in furtherance of the paramount law.

See cases cited in petitioner's brief, pg. 17, *et seq.*

(c) That a release of liability "made beforehand" by a railroad employee is equally valid with a release of a claim already accrued. (R. R. brief, pg. 24.)

The brief cites no authority for this remarkable assertion. That railroads could bargain in advance with their workers for total or partial immunity from the consequences of violating Federal Safety Appliance laws is manifestly against public policy and contrary to the principle of *T. & P. Ry. vs. Rigsby*, 241 U. S. 33 and *Railroad vs. Schubert*, 224 U. S. 603.

(d) That the operation of the Ohio Statute and the steps taken by the company and Gilvary thereunder did not amount to "putting the parties to an election." (R. R. Brief, pg. 24.)

Counsel's argument here is the probable product of a natural anxiety to escape the rulings of this Court. Nothing in the brief serves to distinguish the operation of the Ohio Statute from those before the Court in the cases where this Court ruled upon the proposition. Whenever the State machinery is such as that the parties are invited, required or privileged to surrender a Federal status and in lieu thereof to submit themselves to the operation of then existing (and presumably all future) state laws the process of "putting to an election" has occurred. So long as only state rights or remedies are involved, there is no Federal question presented but if the choice must be made as between a State and a Federal status, the local law becomes an encroachment and an interference, not to be supported by beneficent purposes.

(c) That the "election of contract by Gilvary was not prohibited by Congress." (R. R. Brief, pg. 26.)

The brief notices that as to Federal Employers' liability any such attempted contract would be invalid under Section 5. This, of course, would include all Safety Appliance violations which happen to occur in interstate commerce. The argument is that the failure of Congress to prohibit contracts and devices in respect to Safety Appliance liability is to be construed as a permission to the States to take jurisdiction of the remaining phases of the subject matter.

The correct view indicated by the decisions of this Court is that no express prohibition is needed; that when Congress took over the control of interstate and intrastate rolling stock and prescribed its physical equipment there was no necessity for a specific prohibition to the states as to local legislation on that subject and that as matter of law all such local laws became immediately inoperative; that similarly there was no need for Congress to prohibit, by express enactment, any interference by the States with rights of action accruing to employees from violation of Safety Appliance regulations, since the mere exercise of the Congressional power excluded the States. Manifestly, the power in the States to amend, modify or substitute for the civil and penal liability fixed in or contemplated by the Federal Safety Appliance Act would, if tolerated, amount to a recognition of the power of the States to repeal such Federal Acts outright. It has already been seen (petitioner's brief, pg. 21) that when this Court denied the power of the States to interfere with the Federal Employers' Liability law by providing for workmen's compensation in cases of non-negligent injury to interstate employes such denial was grounded, not upon Section 5 of the Employers' Liability Act, but upon the principle just stated, that the paramount law excluded the local law.

## THE ELEMENT OF VOLITION.

(R. R. Brief, pgs. 37 *et seq.*)

Respondent seeks to distinguish the instant case upon the ground of the "voluntary" or "express" agreement entered into by the parties. This argument, it is submitted, cannot be supported, upon the following grounds:

(1) In no respect does such voluntary contract, or the statute seeking to authorize it, or the state machinery set up to effectuate it, escape the interdict of this Court against legislative or executive action by the States which encroaches upon or interferes with a subject matter of Federal cognizance. The volitional nature of the contract does not cure the encroachment.

(2) Neither the contracting parties nor the State itself could endow a State executive body with jurisdiction to adjudicate rights created by a Federal Statute.

(3) There is no difference in substantive effect between an implied contract of employment arising from the volitional conduct (or inaction) of the parties and an express contract declaring the same result. A voluntary election under Compensation Laws is not any more or less conscious or intentional, in legal contemplation, whether it arises from a presumption of assent based upon conduct or silence, or whether it is expressed in a written instrument. In both cases the contract of employment includes the Statutes as part of the terms of employment. If from the nature of the subject matter an implied assent cannot be sustained (as in case of election between Federal and State rights) the essential nature of the case cannot be changed merely because the agreement is made express.

It has already been suggested in petitioner's principal brief that the essential status of the employe under Workmen's Compensation is contractual in character. This concept is subject to material qualification as shown below but to the extent that it is susceptible of adoption it presents no elements of novelty, being founded upon the meeting of the minds of the parties and arising from the adoption of the statute as a term of the contract of employment. This principle is shown by the following quotation from 28 *R. C. L.*, page 734, section 28:

"Formalities of Acceptance or Rejection. Notice.

Under many of the statutes both employers and employees are presumed to accept the provisions of the act unless some affirmative action on their part evidences an intention to the contrary, such action being usually the filing of certain papers with the proper state officials indicating a repudiation of the compensation principle. In other states, however, it appears that some positive act of the parties is essential to bring them within the operation of the statute. *The choice, it is said, is no less voluntary and optional under the acts requiring affirmative rejection than under the statutes prescribing a positive acceptance.* Under a statute providing that notice of an election by an employee not to accept its benefits must be made within a certain time, otherwise he will be deemed to have accepted it, it has been held that an employee who has been injured and has subsequently filed his election not to accept will be considered as within the provisions of the statute at the time of his injury and cannot bring an action at law therefor. * * * Some acts impute to the employee knowledge of the employer's acceptance of the law; others require actual notice, usually in the form of notices posted in the place of employment; and still others prescribe a statement in writing as part of the contract of hiring."

L. R. A. 1916A, 222; Ann. Cas. 1915C, 308; Ann. Cas. 1918B, 717.

L. R. A. 1916A, 221; Ann. Cas. 1915, 308; Ann. Cas. 1915C, 308.

The contractual character of the status of employees in such cases is well illustrated in a long line of cases involving extra-territoriality. A typical example is that of *Crane vs. Leonard, et al.*, 183 N. W., 204 (Michigan, 1921). 18 A. L. R. 285. It was held that under an optional Workmen's Compensation Act the relationship between master and servant is that of contract and as such would cover the case of injury beyond the state. The opinion reviews exhaustively the decisions of many Courts of last resort, especially those of New Jersey, Connecticut, Rhode Island, West Virginia and Minnesota. In *Gooding vs. Ott*, 77 W. Va., 487, cited by the Michigan Court, it was said:

> "But where as in New Jersey and in this State the Statute makes acceptance optional and the parties freely enter into the contract of employment with reference to the statute, the statute should be read into the contract as an integral part thereof binding the parties and enforcible in any jurisdiction the same as any other contract."

To the same effect,

*Rounsaville vs. Central R. R.*, 87 N. J. L., 371;
*Kennerson vs. Tow Boat Co.*, 89 Conn. 367;
*Grinnell vs. Wilkinson*, 39 R. I. 447;
*Pierce vs. Bekins Co.*, 185 Iowa, 1346.

From these cases it will be apparent that from the inception of Workmen's Compensation in this country, the Courts have regarded the relationship of the parties as founded upon and necessarily embracing the familiar elements of contract. This has been true without regard to the variant forms of procedure imposed by the statutes of the different states. These elements were present in the Compensation Laws of New Jersey and New York, from which

jurisdictions arose the cases of *New York Central vs. Winfield*, 244 U. S. 147, and *Erie R. R. vs. Winfield*, 244 U. S. 170. It need not be repeated that in those cases the presence of the contractual factors was regarded by this Court as wholly impotent to set aside the Federal status of the parties and to substitute therefor the rights, remedies and status called for by the local contract.

Hence, recurring to the facts of the instant case, the legal status of Gilvary and his employer is equal to, but not greater than that of any other parties bound contractually whether expressly or impliedly by a system of compensation. The dignity of the status is not enhanced by an excess of formality and the resort to a writing, as in the instant case, effects no change of a fundamental nature since the writing in Ohio under the statute in question was merely evidence of what in other states was achieved in a less formal manner.

The case presents a further important question: Once a railroad and its employes submit themselves to the State authority as to rights, defenses, remedies and penalties, connected with Federal regulation (by Congress, Interstate Commerce Commission and all others) what are the continuing powers or jurisdiction of Congress and the States? Could Congress adopt a Workmen's Compensation Law of its own applicable to all workers injured by violation of Safety Laws? If so how would this affect employes who had already been assimilated into the State systems? Could the state remove the 50% penalty which Ohio now imposes where an injury is caused by a safety violation? Could a State repeal or greatly reduce the damages recoverable for wrongful death? If the Industrial Commission of the State of Ohio rejects a claim based on violation of Federal Statutes does the employe have a right Federal in nature or is the origin of his rights lost in his submission to the actuarial system of State insurance?

Does the Industrial Commission of Ohio in passing upon the legal question as to violation of a Federal Safety Appliance Statute remain bound by Federal Laws and decisions rendered or to be rendered by Federal Courts construing such statutes?

These questions indicate in part the problems that arise from the conflicting power of different legal agencies acting upon the same subject matter. They show the evil and confusion which arise from subjecting to State control an employee with Federal rights. This Court has disapproved the attempt of Congress to make available the State Workmen's Compensation systems for maritime workers. *Knickerbocker Ice Co. vs. Stewart*, 254 U. S. 149.

The obvious effort of respondent is to clothe the so-called election by Gilvary with the attributes of express contract and thereby to distinguish it from the types of election involved in *Employers' Liability Co. vs. Cook*, and *Erie R. R. Co. vs. Winfield*. This effort fails for at least two clear reasons:

(1) The Gilvary election lacks the elements of a true or express contract since the terms of it are left wholly subject to the changing provisions of the state law. That is to say, the amount of regimented benefit, the time of payment, the extent of penalty, rights of appeal and all other essential terms are and will continue to be what the statutory system prescribes. There is no fixity of terms or of right. Hence, the only effect of the signing of the paper in question by Gilvary was to subject him to the Workmen's Compensation Law of Ohio, as to subjects within the state's power. Thus viewed, his status is no more and no differently "contractual" in the express sense than that of any submitting employe under any form of election.

(2) The mere subscribing or written execution of a submission to the State law was present in *Employers' Liability Co. vs. Cook*, where The Ford Motor Co., as employer, had subjected itself by formal written declaration under Texas law. When the employe entered the Company's service the relationship became complete, with the original writing as the basis of the "contract." But this Court had no difficulty either with the element of express contract or with that of estoppel as now urged in the respondent's brief. *Employers' Liability Co. vs. Cook*, 281 U. S. 233.

It is repugnant to every essential characteristic of a true contract that the terms of it are wholly subject to change and modification by an external power.

The last two paragraphs are not to be taken as conceding that even if a true or express contract were made by an employer and employe they could translate themselves and their rights from a Federal to a State forum or from State to Federal. To adopt such view would entail a solution of the two fold problem elsewhere noted herein, that of jurisdiction and public policy.

## THE CLAIM OF ESTOPPEL.

(R. R. Brief, pg. 43.)

The State Courts ruled against the respondent upon this issue. Since no Federal question is predicated upon the claim, it is difficult to see why this Court should be called upon to determine it. To begin with, the defense was not pleaded. Nor were there any facts introduced in evidence to show any conduct on Gilvary's part that misled the railroad. The respondent chose the language of the instrument on which it now relies. If that was legally insufficient to constitute a basis for considering Gilvary to be bound by the state act as to rights under the Federal law,

the responsibility for that situation rests upon the railroad. Where both parties have equal means of access to facts and law, each has an equal burden and neither can assert estoppel against the other. Especially where, as here, the rights of the parties grow out of or are determined by a legal document and involve complicated questions of law, the claim that one party has misled the other does not lie. Estoppels do not arise out of legal opinions or errors as to the law.

*Commercial Investment Trust Co. vs. Bay City Bank*, 62 F. 2 735;
*Crary vs. Dye*, 208 U. S. 515.

But there was nothing in the "contract" itself to lead the company to believe that it should pay premiums to the state based upon injuries which fell under Federal law, since by the proper interpretation of the statute (and of any election under it) the only subjects covered by Gilvary's waiver or submission were those "not forbidden by Acts of Congress" which as has elsewhere been shown, meant subjects not provided for by Acts of Congress.

This condition, as appears from the election itself, was not met. The company has therefore no basis in the contract itself to assert an estoppel. Nor did Gilvary by act or representation cause the company to believe that the election had a scope sufficient to cover the remedies given him by Congress.

Without extending the argument further, the authorities cited under the various divisions of the brief for petitioner negative any right or power in the railroad to attempt the "election" represented in the document which is the basis of its claim. The decision in *Booth Fisheries vs. Industrial Commission*, 271 U. S. 208, has no application since there was no attempt in that case to compel an election between a state and a Federal right. The

company there had deliberately made its choice as between two state remedies. The company was bound by its election just as the employee has been held bound by his election. The claim of counsel at page 49:

> "We see no difference between the position of Gilvary and that of the Booth Fisheries Company."

betrays a complete disregard of the decisions which we regard as controlling. If by the simple expedient of asserting an estoppel the parties could have been foreclosed against the assertion of their rights under Federal law, then many of the cases cited in petitioner's briefs on the subject of the supremacy of that law have been erroneously cited. Furthermore, the railroad received the full consideration for which it bargained. During Gilvary's period of employment it was protected by his submission as to his strict intra-state character.

Respondent is in the position of contending that parties may, by the reciprocal action of mutual estoppels, hurdle the dividing barriers of jurisdiction and redistribute governmental powers by their private controversy.

The statement in respondent's brief (pg. 43) that even if the Ohio statute be held invalid because of conflict with the Federal Act the parties would still be bound upon the theory of estoppel wholly ignores the grant of quasi-judicial power to a State administrative Board which would necessarily grow out of the asserted estoppel.

## THE FACTS.

(R. R. Brief, pg. 3.)

It is admitted that the respondent is a common carrier by railroad engaged in both intrastate and interstate commerce; that petitioner was a switchman employee of said company and that at the time he was injured he was engaged in a coupling operation in the "east slab" yards of the railroad company.

In said yards there is a track known as the east track and after doing some switching on the running track and west track, in said yards, the yard crew (of which Gilvary was a member) moved over to the east track. This track runs north and south and it was the purpose of the particular movement to couple a cut of six moving cars to a standing Pittsburgh, McKeesport and Youghiogheny loaded hopper car. The cut of cars had the engine at its northerly end facing the north and backing southerly. The leading or most southerly car of said cut was a Baltimore and Ohio gondola car loaded with lumber and it was the purpose to couple the said moving gondola to the standing hopper car.

The knuckle of the standing hopper car was open; the knuckle of the moving car was closed (this is the usual, customary and proper way of coupling, one open knuckle being sufficient). (R. 46.) Gilvary was the rear brakeman in the crew and his work was to supervise the coupling to see that the coupling was "made." The conductor, Melvin, stood about two car lengths north of Gilvary, writing numbers; Skuce, the head brakeman, stood north of him, and the engineer, Cornell, was further north in his cab, all being on the same side or the east side with a difference of about 300 feet between Gilvary and the engineer.

When the cut of cars was set in motion and the leading B. & O. car came in contact, by impact, with the standing P. McK. & Y. car, the couplers failed to couple automatically and the knuckle on the standing car closed, the standing car being shoved backward about two or three feet toward the south, which car Gilvary immediately blocked. Gilvary then took hold of the lifting or cutting lever to open the knuckle. After some effort he got the knuckle open. (R. 48.) He then signalled the engineer to back again southerly in order to make the coupling. The cut of cars came back and again the couplers failed to couple by impact and again the knuckle on the stand-

ing car closed, said car being again shoved about two or three feet further south by the impact. Gilvary again attempted to open the knuckle by means of the operating lever but he could not open the same. He then tried to open it with his hand by going in between the ends of the cars but it would not open. He tried to open it with the lifting lever and with the lock pin. While between the cars he then decided to open the knuckle on the B. & O. gondola car. He could not use the lifting lever of this coupler as it was on the other side of the car. He also noticed that this coupler had been thrown or knocked out of alignment by the last impact and he knew that it would not couple in that position. It was six or eight inches out of line toward the west, the usual play of drawbars being a play of two to two and one-half inches. (R. 50.) After giving a signal to hold the cars, Gilvary went between the ends of the cars. He then tried to open the P. McK. & Y. coupler again with his hands, but same would not open. He then stepped over to the B. & O. gondola car, put his left arm about the coupler to put it back in line and as he was so engaged the cars came together and injured him.

The facts as testified to by Gilvary were particularly substantiated by the testimony of Skuce, the head brakeman. While the defendant attempted to show, through Melvin, the conductor, and Cornell, the engineer, that Gilvary was hurt in the first attempt at coupling, and only one signal was given by him, *Skuce*, testifying for the defendant *completely corroborated the testimony of Gilvary*, stating that Gilvary was hurt on the second attempt and that four signals were given, three of which came directly to him from Gilvary after the first attempt. (R. 141, 142, 143.) Skuce testified on this point as follows (R. 143):

> "Q. Was it on the first attempt or on the second attempt that he was hurt?
>
> A. Second."

If it were on the first attempt one signal would be the only signal that would be necessary. If four signals were given then it would substantiate the testimony of Skuce and Gilvary, that it was at least the second attempt that caused the injury.

To recapitulate, the testimony of Gilvary is corroborated as follows:

(a) The testimony by Skuce, on cross examination, who stated it was on the second attempt that Gilvary was injured, and that there were four signals, three direct from Gilvary. (R. 143.)

(b) The testimony of Keppers, the yardmaster, who, from the tests, testified that the knuckle was opened by means of lifting the lever and the use of one hand (R. 131, 132) and the farther testimony of Keppers that the cars were about on a straight track at the time of the accident. (R. 128.)

If the Court will read the testimony of Keppers and Skuce, but particularly the testimony of Skuce, (R. 133) it will find that the testimony of Gilvary was corroborated to an unusual degree.

## CLAIMED ERROR AS TO QUANTUM OF PROOF.

(Respondent's Brief, pg. 48.)

Counsel introduce this branch of the argument by quoting a few questions and answers to show that Gilvary was unable to describe any defect in the coupler discoverable by ocular inspection alone. (Brief, pgs. 48-49.)

No one had claimed that the defect was cognizable by the mere sense of vision. What was claimed was that coupler would not work. The condensed statement of the testimony follows:

"as the cars came together, the knuckle closed and failed to couple. (R. p. 47.) I got hold of the cutting lever and I couldn't open it with one hand, so I got the two, shook it three or four times and it finally came open. I signalled the engineer to back up. They did not make. The same knuckle closed again. (R. p. 48.) I tried to open the coupler on the hopper car again. I was unable to open it with the lifting lever. I decided that I would try, go in between and open it so I swung the engineer down again. I got in and tried to open the standing car with the lever, with the lockpin, with my hand in between the cars, but I was unable to open the coupler (R. p. 49) and then decided I would line up the B. & O. car, but the drawbar was not in line. Was knocked out of line about six or eight inches. I got hold of the drawbar to pull it over. About the time I got the weight of my arms they backed up on me." (R. p. 50.)

Cross examination:

"Coupling didn't make. The knuckle on the 'Pee-Mickey' car closed. (R. p. 70.) I got hold of the cutting lever and finally opened it with my two hands. (R. p. 73.) I signalled to the engineer. The cars hit again and didn't make. (R. p. 74.) The knuckle closed. I couldn't get it open by the cutting lever. Went in between and gave it a couple of pulls. Couldn't get it open and decided to line up the B. & O. (R. p. 75.) Put my hand on the drawbar; just went to pull that over and the cars came back on me." (R. p. 76.)

These excerpts show a state of facts bearing a strong natural resemblance to those appearing in the coupler cases generally. The cases cited under a later caption, entitled "CLAIM AS TO PROXIMATE CAUSE" *infra*, will show that the circumstances of Gilvary's injury, the necessity of going between the cars, the repeated but ineffectual efforts to couple, the impact of the cars occurring while the employe was in the place and engaged in the act that the law seeks to guard against—all occurred in about the usual way

because the operation was the usual and customary one, as was apparently the defect. See especially the following cases:

*San Antonio Ry. vs. Wagner*, 241 U. S. 476;
*Atchison T. & S. F. Ry. Co. vs. Keddy*, 28 Fed. (2) 952;
*P. & R. Ry. vs. Auchenbach*, 16 Fed. (2) 550.

Respondent at page 49 is in effect asking this Court to review the finding of the jury upon the weight of the evidence by urging the effect of the "rigid inspection" after the accident, the "actual coupling" of the same cars, the "running tests" and the testimony of certain experts. As to each of these points (which respondent claims sufficient "not merely to equalize but to overcome" the admitted prima facie case of plaintiff below) there was not merely permissible but abundant ground for the action of the jury, of the trial court, of the Court of Appeals and of the Supreme Court of Ohio in rejecting the railroad's claims:

(a) The testimony of Keppers (Pg. 128) put the place of the accident at "just about at the curve" which of course also meant just about on the straight track and confirmed Gilvary, who said there was a slight curve. (Record pg. 58.)

(b) The "rigid" inspection was wholly ex parte. Neither Gilvary nor any impartial person was present. (R. pgs. 95, 120, 127, 144.)

(c) The "actual coupling" referred to was also strictly ex parte. But by the admissions of the railroad witnesses the couplers would not work without the men going between the cars. See testimony of Keppers, yardmaster, as to the tests made by the car inspector after the accident; Keppers testified as follows:

(R. pg. 131):

"Q. Did they open—the knuckles—open right up?

A. He pulled the lever and opened the knuckle and then closed it with his hand three or four times.

Q. Well, did he open it with his hands?

A. I don't believe he did. It isn't necessary.

Q. Was it necessary, that day?

A. I don't think so.

Q. I will ask you whether this question was asked of you, and this answer given by you at the last trial. 'Then what was done?' Answer: 'The car inspector opened and closed both knuckles.' Question: 'And how did he do that?' Answer: 'By pulling the lifting-lever with one hand and operating the knuckle with the other hand.' Did you so testify at the other trial?

A. Yes, sir.

Q. Is that the fact?

A. That is the way he was making his test, pulling it open with one hand and operating the knuckle with the other hand."

(R. pg. 132):

"Q. Well, didn't you say at the last trial: 'The car inspector opened and closed both knuckles.' 'How did he do that?' 'By pulling the lifting-lever with one hand and operating the knuckle with the other hand.' Isn't that correct?

A. Yes, sir."

(d) The testimony as to the inspection and tests shortly after the accident does not satisfactorily show that the cars were standing upon the curve in the same position as at the time of the accident. The testimony as to the "running tests" made upon another track on the succeeding day affirmatively shows that the conditions were not the same. (Record pgs. 127, 128, 144, 146, 148, 150.)

## CLAIM AS TO PROXIMATE CAUSE.

(Respondent's Brief, pg. 51.)

(For the detail of evidence touching the question of proximate cause reference is made to caption "Error as to quantum of proof." B. 1, page 15 herein.)

Questioning the plaintiff below as to the "cause" of the accident, the attorney conducting the cross examination elicited the statement that after Gilvary had gone between the cars because of the failure of the couplers to work and while pulling one of the couplers into alignment the cars backed down and caught his arm between the draw-bars.

It seems remarkable that this classic and traditional form of railroad worker's injury—the typical casualty which occasioned the enactment of the Safety Appliance law—should again be challenged as a "condition," and that the original causation flowing from the defective couplers should be seriously regarded as broken by the movement of the cars. Since, however, the point is made, the authorities will be marshalled with none but the briefest comment. In many of them the inference of active, concurring negligence on the part of other employes is quite strong. The negligence of the company's engineer in the instant case is apparent but it concurred with the violation by the company with respect to the couplers. The cases more directly applicable are as follows:

*Railway vs. Taylor*, 210 U. S. 281;

*Railway vs. Brown*, 229 U. S. 317.

*P. & R. Ry. vs. Auchenbach*, 16 F. (2) 550 (C. C. A. 3). (Brakeman injured between cars due to backing movement caused by signal from flagman. Liability upheld on ground that defective couplers had required plaintiff to go between cars.)

*Railroad vs. Goneau*, 269 U. S. 405. (Brakeman repairing defective draw-bar on bridge, lost balance and fell.

Claim that the Safety Appliance defect was merely a "condition." Defect held proximate cause.)

*Railway vs. Drake*, 276 F. 393. (Brakeman after three attempts to couple went between the cars to fasten them with chains. Claim that primary causation had terminated since plaintiff was no longer between the cars to couple. Denied and verdict upheld.)

*Railroad vs. Voelker*, 129 Fed. 522, aff. 222 U. S. 222. (Holding that the acts of preparation for the coupling operation due to non-functioning of the mechanism are integral connected and indivisible parts of the operation of coupling and cannot be isolated from the impact itself.)

*Donejan vs. Ry.*, 165 F. 869. (Brakeman between cars, because of defective coupler, stepped into unblocked frog. Held a question for the jury as to proximate cause.)

*C. R. I. & P. Ry. vs. Ray*, 168 Pac. 999 (Okla.) Cert. Den. 246 U. S. 662. (Holding that curve in track hindering effective coupling was no defense.)

*Payne vs. Colvin*, 276 Fed. 15 (C. C. A.). (Plaintiff in attempting to open knuckles, engineer failing to heed signals, plaintiff slipping on ice sustaining crushed foot, held within Act.)

*Atchison & C. Ry. vs. Keddy*, 28 F. (2) 952. Cert. Den. 279 U. S. 856 furnishes a clear answer to the immediate inquiry. There the plaintiff was engaged in a coupling operation and the engineer negligently backed the train against him. The railroad urged that the defective coupler was not the proximate cause of the accident. This contention was carefully examined by the Court of Appeals for the 9th Circuit and denied.

As elsewhere herein shown (page 24) the testimony of the experts as to the influence of the curve was not uncontradicted since one of them (Gensley, R. pg. 167) stated

that the couplers if in proper condition should have coupled upon a ten degree curve. Also Gilvary had testified (Record, pgs. 43 and 83) that he had for years seen cars couple automatically by impact at that same point on the track in question.

Whether the quantum of evidence in a case grounded upon the Safety Appliance Act is determined by State or Federal laws is of no moment since there was, within the controlling decisions of this Court, substantial testimony supporting plaintiff's petition, constituting admittedly a prima facie case and presenting a jury question.

*N. Y. C. Ry. vs. Marcone*, 284 U. S. 345;
*G. N. Ry. vs. Donaldson*, 246 U. S. 122.

*P. Co. vs. Chamberlin*, 288 U. S. 333.

Syllabus 2. Where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury without regard to the number of witnesses upon either side.

*W. & A. Ry. vs. Hughes*, 278 U. S. 497.

**REFUSAL TO CHARGE.**

(Respondent's Brief, pg. 53.)

Respondent makes a novel claim with respect to charges 6 and 7. It is thus stated in the language of counsel (pg. 54):

> "In the first place the Court refused after having given *part of the law* (Defendant's Request No. 6) *to complete the correct statement* by giving Defendant's Request No. 7."

It appears therefore that two requests were so linked together as that the giving of one would force the Court to give the other. Thus the separate charges were not complete, distinct and severable statements of the law and

both were in violation of Ohio law. The Court, however, gave No. 6. (Respondent's Brief, pg. 55.)

Again the brief avers:

> "To supplement instruction No. 6 and to define the terms implied in Instruction No. 6, the defendant requested 'Request No. 7.'"

For convenience of the Court we feel obliged to set forth both charges.

Instruction No. 6.

> "I say to you as a matter of law that the fact that these Baltimore & Ohio and P. McK. & Y. cars failed to couple does not necessarily establish that either or both of the couplers were defective, and you must consider all of the surrounding circumstances, including the curve or curves of the track, the grade thereof, the length of the cars and the fact that there is necessarily a permissible amount of side-play in the draw-bars. Hence, if you find that the failure of these two cars to couple was solely due to the curve, the grade of the track and the non-alignment of the draw-bars, due to a permissible side-play thereof, or that such failure was solely due to any, or any combination, of said causes, the plaintiff cannot recover here, and your verdict will be in favor of The Cuyahoga Valley Railway Company."

Instruction No. 7.

> "I instruct you that side-play in a coupler, according to a standard in general and accepted use on railroads, does not constitute a defect in the coupler, and unless you find by a greater weight of the evidence that there was in one or both of the couplers involved in this case greater side-play than was necessary to bring about, when properly operated and given a fair trial, the automatic coupling of the cars by impact, then I say to you, as a matter of law, that neither of these couplers can be found by you to be defective in that regard. Hence I say that if, by the

greater weight of the evidence, you shall find that a failure of these two cars to couple was solely due to a curve of the track and the permissible side-play of the couplers, as I have just defined it to you, or either one of these conditions, your verdict will be in favor of the Cuyahoga Valley Railway Company."

The Assignment of Error, based on the rejection of No. 7, failed to gain the approval of the Ohio Courts. It is untenable for the following reasons:

(1) The first instruction (No. 6) was so comprehensive in its terms as to be erroneous in the latitude extended to the jury to allow collateral facts and circumstances to defeat the positive requirement of the Safety Appliance law. The jury were allowed, without rule or guidance, to consider (a) curve, (b) grade, (c) non-alignment of draw-bar due to *permissible* side-play, (d) length of cars, (e) *all the surrounding circumstances.* Under either system of law, either State or Federal, it cannot be allowable to supplement an illegal charge by an additional charge; especially one that is in itself improper. Not satisfied with this sweeping invitation to the jury to use their own views about the efficiency of the couplers in the light of factors some of which were scientific and technical and others which were or could be irrelevant, the railroad desired a partial repetition of instruction No. 6 by including in the Request (No. 7) a second ruling as *matter of law* that "if the failure of these two cars to couple was solely due to a curve of the track and the permissible side-play of the couplers *as I have just defined it to you,* or either one of these conditions" your verdict shall be for the railroad.

The respondent was not entitled under Ohio law to two overlapping references to these exculpatory circumstances. The Court could not properly single out the special features of the railroad's defense and emphasize them.

*Chesrown vs. Bexier*, 101 O. S. 282;
*Limbaugh vs. Ry.*, 94 O. S. 12;
*Ozler vs. Ry.*, 109 O. S. 551;
*American & C. Co. vs. Conkle*, 86 O. S. 117;
General Code Ohio, Sec. 11447.

(2) The requested charge states the Court "had just defined" the permissible side-play. But the Court had not defined such side-play or fixed the limits of its permissive movement. That was an issue in the case and no two witnesses fixed the same limits. What was permissible depended upon all the factors as shown by the evidence. It depended particularly upon the extent of the curve at the point. If the curve were so slight as not to hinder the operation (as Gilvary testified, pg. 58) then the "permissible side-play" would be much less than at a more acute curve. There was a dispute in the evidence as to the extent of curve at the point of the accident. Hence the Court did not and could not define the "permissible side-play" as stated in Request No. 7. Also, it was improper to ask the Court to use the language "if you find the failure * * * was solely *due to a curve*" since the jury would naturally be misled into a belief that if the operation occurred *upon a curve of any degree* they would be allowed to return a verdict for the railroad although such curve were so slight as to be negligible. Indeed, the railroad's expert, Gensley, Trainmaster for the B. & O. Railroad, testified for the respondent as follows (pg. 167):

> "Q. Well, suppose they (the cars) are both properly lined up should they couple automatically by impact if one coupler is open? A. On a curve?
>
> Q. If they are properly lined up on a curve. A. Depends on the degree of curve and the impact.
>
> Q. A ten-degree curve, and an impact and the (draw-bars) properly lined up and the couplers open, should they couple if both couplers are in proper shape? A. Yes they should couple."

(3) The latter part of Request No. 7 is stated in the disjunctive, thus:

> "if you shall find that a failure of these two cars to couple was solely due to a curve of the track *and* the permissible side-plays of couplers *or* either one of these conditions" your verdict will be for the railroad.

This allowed the jury to exculpate the railroad for a failure due to curve alone (of undefined degree) or to coupler side-play alone (limits not fixed) irrespective of extent of curve.

We find no authority which allows segregation of these elements. It may be that this Court has furnished some warrant for a defense based upon their joint effect, but neither curves alone, nor side-play alone constitute a defense to the absolute duty imposed by the Act and it would be improper so to charge a jury.

*C. R. I. & P. Ry. vs. Brown*, 229 U. S. 317;
*Ry. vs. Taylor*, 210 U. S. 281;
*Hohenleiter vs. So. Pac. Ry.*, 177 F. 796.

(4) The request assumed that there had been a general and accepted standard among railroads which as matter of law was binding. This was erroneous. *Roberts Interstate Carriers*, Section 809, citing many cases.

The objections to the general charge (Respondent's brief, pg. 56) are untenable under the various decisions of this Court in similar or analogous cases cited elsewhere herein. The complaint at page 57 however is so far from the facts that it deserves special notice. It is said by counsel that

> "In effect he (meaning the Court) instructed the jury that the failure of the coupler to operate was conclusive evidence of its defective or inadequate or insufficient condition" etc.

A reading of the quoted part of the general charge at page 56 (Record, pgs. 191, 192) where the Court again authorized the jury to consider the general circumstances, grade, curve, practical operation of a railroad, etc., will show that the objection should not come from the respondent. The error was wholly in its favor. See as to form of charge, *Wheeling & C. Ry. vs. Russell*, 209 F. R. 795, (C. C. A.).

The claim as to misconduct of counsel (Respondent's Brief, page 57) is based upon a reading by counsel for plaintiff below of certain language from a lawbook. Upon motion, the Court admonished the jury as follows (Record, pg. 186):

> "The Court will instruct the jury that the argument of counsel on either side is not evidence in the case now or at any time. Later the Court will instruct you as to the law."

The assertion of respondent's counsel (pg. 57) that "there was no instruction by the Court to disregard the argument made" and that the argument "had the implied approval of the Court" is not sustained by the Record. The point is controlled, so far as this practice is concerned, by *Timberman vs. State*, 107 O. S. 261, and *Montanari vs. Haworth*, 108 O. S. 8.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 575

JOHN L. GALVARY,
*Petitioner,*

vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

W. T. KINDER,
Union Trust Bldg., Cleveland, Ohio,
*Attorney for the Respondent.*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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*Respondent.*

## BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

### STATEMENT.

It is necessary to amplify somewhat the statement of the case contained in petitioner's brief, in order to clarify the issues that this case presents.

The petitioner, John Gilvary, was injured during his employment as a brakeman by The Cuyahoga Valley Railway Company. The Cuyahoga Valley is the plant railroad of The Otis Steel Company at Cleveland; it engages occasionally in interstate commerce, but, at the time of the petitioner's injury, it was conducting an entirely intrastate operation. (R. 39-42.) Gilvary's arm was severely injured when he went between two cars standing upon a curve in the track, after they had failed to couple by impact. (R. 65.)

Gilvary brought suit in the Common Pleas Court for Cuyahoga County, Ohio, making several allegations of negligence and asking damages against the Railway in the sum

of $50,000. (R. 12.) At the trial of the case, he withdrew all allegations of negligence except that the Railway Company had failed to comply with the Federal Safety Appliance Act, and that the couplers of the cars in question were defective or insufficient within the meaning of that Act. (R. 55.) The only evidence adduced by the plaintiff on the alleged defect or insufficiency was the failure of the cars to couple by impact at the time of the accident. No witnesses were called to testify to an observed defect or mechanical insufficiency; and the plaintiff himself stated that his observation of the couplers at the time of the accident had showed no such mechanical imperfection. (R. 95, 96.)

In its answer, and on the trial of the case, the Railway relied on two defenses:

(1) It denied that the couplers were defective and introduced evidence showing that careful inspections and an actual coupling made immediately after the accident indicated that the couplers were adequate and were in perfect mechanical condition (R. 116, 117, 146, 152); that running tests made at different speeds on the day following the accident had demonstrated that the couplers operated flawlessly by impact alone (R. 172, 174, 176) (photographs of the couplers made the day after the accident were produced, R. 179, Defendant's Exhibits 6, 7 and 8); that at the time of the accident the cars were situated and the coupling attempted at the point of a ten-degree curve and on a slight grade (R. 76, 77, 140, 141, 183); that couplers necessarily possess four inches of lateral play, to permit them to accommodate themselves to curves in the track (R. 147, 191, 197); that to bring about an automatic coupling when, as in this case, the cars are on a curve, it is necessary to align the couplers with each other by adjusting the drawbars within the permissible lateral play thereof (R. 190, 196) and to open the knuckles of at least one

coupler; that it was the duty of Gilvary, before signalling the engineer to move the train, to adjust the drawbars, and if necessary to open the knuckles (R. 61, 72, 83); that the failure of the cars to couple by impact, which induced Gilvary to go between them, had resulted from his failure, before attempting the coupling, to align the couplers in order to accommodate the coupling operation to the curve.

(2) As a separate defense the respondent pleaded and established (and the petitioner concedes) (Stipulation, R. 245) that as authorized but not required or compelled by the Workmen's Compensation Act of the State of Ohio (Ohio General Code Sec. 1465-98), prior to the accident and at the time of his employment Gilvary had entered into a written agreement with the Railway Company by the terms of which his rights and those of his dependents, in the event of his injury or death sustained during an engagement in *intrastate commerce*, would be governed by the provisions of the Ohio Compensation Act. As hereinafter pointed out, the Ohio Act, like other compensation acts, provides a method of compensation for injuries and death sustained irrespective of fault and also provides compensation to employees or dependents in the event of injury or death from occupational disease, so-called, of all of which Gilvary would have received, and still may receive the benefits. The contract recites in full the statute under which it is made and requests on behalf of both employer and employee that the Ohio Compensation Commission approve their election to be governed by the Ohio Act as to injuries occurring in intrastate commerce. The contract recognizes that the insurance premium is payable by the employer to the state only in respect of employees who join in the contract and application; and the respondent had regularly paid into the state fund premiums for insurance and had otherwise complied with the act to the end that its benefits should be secured to its employees includ-

ing Gilvary. For the convenience of the Court, the relevant provisions of the Ohio Constitution and statutes and the contract itself are set out as Appendix "A" of this brief.

The trial court withdrew such defense from the jury (R. 227), holding that notwithstanding the intrastate character of the engagement the contract was as a matter of law no defense in an action asserting a violation of the Federal Safety Appliance Act.

The trial court likewise rejected the Railway's contention, made by a motion to direct a verdict (R. 217, 218), that the evidence failed to establish by the requisite degree of proof any defect in the coupler or couplers, and overruling the motion, submitted the question to the jury, which returned a verdict in favor of the plaintiff in the amount of $35,000. (R. 233.)

Upon error proceedings the judgment of the trial court was reversed by the intermediate appellate court, which entered final judgment for the respondent on the sole ground that the agreement between Gilvary and the Railway Company was a complete bar to the action, the appellate court, however, finding no other error in the proceedings below. (R. 4, 5.)

Plaintiff thereupon prosecuted error proceedings to the Supreme Court of Ohio. In that court the Railway, as authorized under the Ohio rule (*Clark v. Stewart*, 126 O. S. .....) not only urged in support of the judgment the agreement upon which the intermediate court had rested its decision but also made the contention that it was entitled to a directed verdict in its favor by reason of the state of the evidence on the question of the existence of a defective coupler or couplers.

The Supreme Court of Ohio being equally divided, the judgment of the Court of Appeals was affirmed without opinion. (R. 249.)

As a basis for petitioner's application here for writ of certiorari to review the judgment of the Supreme Court of Ohio, it is asserted that such judgment is in conflict with the decisions of this and other courts concerning the rights of railway employes injured in the course of *intrastate commerce* by reason of the use of equipment said to be defective under the provisions of the Federal Safety Appliance Act. The petitioner's statement indicates that this is the only issue presented. This contention is not wholly accurate. The question, for instance, what evidence will send to the jury a case under the Federal Safety Appliance Act is a question of Federal rather than of state law; which the Railway has raised in all the lower courts and which is open to it here. Of these and other matters which the Railway would urge upon this Court in support of the judgment, if the case were here upon the merits, the following propositions have a bearing upon the question whether certiorari should be granted:

1. The judgment of the Court below, to the effect that the State of Ohio may validly authorize but not compel or require an employer and an employee to agree that their respective rights and liabilities shall be controlled by the state compensation act so far as concerns injuries arising in intrastate commerce, does not conflict with the decisions of this or other courts which have considered this or analogous questions.

2. Should the case be heard by this Court on the merits, it would be disposed of on an alternative ground, which, since it does not raise a doubtful constitutional issue, would be considered under the settled rule of this Court before the question on which the petitioner seeks to bring the case here. The alternative ground is that under the rule laid down by the decisions of this Court construing the Safety Appliance Act the petitioner was not en-

titled to go to the jury on the evidence presented on the trial. This proposition would require the affirmance of the judgment for defendant, regardless of the decision concerning the validity of the contract between Gilvary and the Railway Company.

## I.

## THE DECISION BELOW, EFFECTUATING THE CONTRACT BETWEEN THE PARTIES TO BE BOUND BY THE OHIO WORKMEN'S COMPENSATION ACT AS TO TRANSACTIONS IN INTRASTATE COMMERCE, IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR OF OTHER COURTS.

No decision has intimated that, if an employee possesses a cause of action against a railroad for a violation of the Federal Safety Appliance Act, he may not voluntarily release it, by contract upon good consideration, which derives its force from the law of the State where it is made. There is no difference in principle between such a release after the fact, and an agreement made beforehand upon good consideration, fixing a fair and equitable means whereby injuries, both negligent and non-negligent, which might otherwise give rise to causes of action under the Safety Appliance Act, may be compensated for.

Gilvary's contract upon which the Railway relies does nothing more than this. When he went to work he agreed in express words to forego other rights of action that might have accrued to him, in favor of a quick, certain and equitable method of compensation for all injuries, whether or not attributable to his employer's fault, that arose in the scope of his employment in so far as it concerned intrastate business. The Ohio statute did not compel him or the Railway to enter into such an agreement; it put neither of them to their election; it merely expressed what would otherwise have been implied from the general prin-

ciples of the common law, that such a contract was wholly legal, and subjected it to the approval of the Ohio Compensation Commission (R. 53, 201, and Stipulation) to insure its fairness.

To give effect to such a contract according to its terms conflicts with none of the decisions that the petitioner cites. (See pp. 4 and 9 *et seq.* of the Brief in Support of Petition.) *Texas & Pacific Railway vs. Rigsby*, 241 U. S. 33, decided that an employee whose injury was occasioned by a defective grab-iron while he was engaged in an intrastate movement had a right of action under the Safety Appliance Act. The Court held that in this respect interstate and intrastate commerce were so intimately blended that Congress might regulate both. Although no conflicting state law was involved, Mr. Justice Pitney, arguendo, used the language quoted at page 9 of the petitioner's brief, and indicated that state law might not interfere with such regulation. He spoke only of the inability of a state to enforce an inconsistent law as law. No syllable of his opinion casts doubt on its right to let the parties contract as they choose.

*Ross v. Schooley*, 257 Fed. 290 (C. C. A. 7), is an illustration of the principle expressed by the dictum of Mr. Justice Pitney in the *Rigsby* case. The employee was hurt by a defective coupler while engaged in intrastate commerce. The parties had made no agreement as to their rights and the court held that, as between the conflicting laws, the Federal Act controlled. Again the issue was the compulsion of the law as such, and not the right of the parties to agree on methods of compensation.

In *Ward v. Erie Railroad Co.*, 230 N. Y. 230, Mr. Justice Cardozo, whose language is quoted at pages 10 and 11 of the petitioner's brief, was dealing again with the claim that the New York Compensation Act of its own

force superseded the Federal law. That the Safety Appliance Act does not depend for its efficacy on the pleasure of the State is undoubted, but that proposition does not forbid the parties to agree as to their rights.

In *Director General of Railroads v. Ronald*, 265 Fed. 138 (C. C. A. 2), the court was considering the right of action possessed by a railroad employee, whose injury from a violation of the Federal Safety Appliance Act occurred while he was engaged, as a majority of the court held, in interstate commerce. The New York Compensation Act contained a clause much like that of the Ohio Act, providing that the act should apply in intrastate commerce only in so far as accepted by both parties. But, as has been seen, (a) a majority of the court thought that interstate commerce only was involved; (b) it nowhere appears that the parties in fact contracted that the New York Act should govern; and (c) when the case was argued in the Federal Courts there was not, as here, a decision of the State Courts applying such contracts to cases under the Safety Appliance Act. The dicta of Judge Manton quoted by the petitioner at page 14, therefore resolve themselves into the conclusion that as a matter of statutory construction the New York law is inapplicable to intrastate transactions involving the Safety Appliance Act—a conclusion that is irrelevant here, in the face of the binding construction given to the Ohio contract by the Ohio courts.

*New York Central Railroad Company v. Winfield*, 244 U. S. 147, is of course inapplicable here, because it only decided that, as to injuries occurring in interstate commerce, New York might not superimpose liability for non-negligent injuries upon the liability for negligent injuries resulting from the Federal Employers' Liability Act.

At page 12 and following of the brief for the petitioner, numerous cases are cited in support of the state-

ment that Gilvary's so-called election to be bound by the Ohio Act was inoperative. These cases do not establish that proposition. The "elective" state compensation acts there in question that were not permitted to apply to maritime or other transactions to which a compulsory act could not apply, have without exception provided that the parties should be bound by them, in the absence of an expressed dissent. An act drawn in this form can be said not to rely upon contract in the same sense as the Ohio Act. A state may imply a contract from the silence of the parties only in so far as it could have bound them directly by compulsory act. *Erie Railroad v. Winfield*, 244 U. S. 170. As regards the extent of the operation permitted, therefore, "elective" compensation acts of this type do not differ from compulsory acts. No inference can be drawn, therefore, concerning the scope which will be allowed to an actual contract between the parties from the foregoing decisions imposing limitations upon elective acts of this sort.

Thus in *Erie Railroad Co. v. Winfield*, 244 U. S. 170, the question was whether a presumed agreement, in the absence of dissent, to be bound by the New Jersey Act ousted the remedy of the Federal Employers' Liability Act as to an injury in interstate commerce. Mr. Justice Vandevanter indicated that since the state could not apply its law, as law, to such transactions, it could not attach the same consequence, by way of contract, to the railroad's silence. The case leaves open the effect of an actual agreement between the parties, even as to interstate injuries.

In *State Industrial Commission v. Nordenholt*, 259 U. S. 263, when holding the New York Act inapplicable to a maritime transaction, this Court indicated that the case was not helped by regarding the act as an "implied agreement." Similarly, in *Baizley Iron Works v. Spun*, 281 U. S. 222, a case involving a maritime tort, "the Pennsyl-

vania statute declares that there shall be a conclusive presumption that both employer and employee accept its provisions unless one of them makes a written statement to the contrary."

The petitioner relies particularly on *Employers' Liability Co. v. Cook*, 281 U. S. 233, a maritime case involving the extent of the operation of the Texas Compensation Act. Neither the opinion of this Court nor of the Circuit Court of Appeals (31 Fed. (2) 497) contains any ground for the petitioner's statement that "the parties had formally submitted themselves, in advance of the accident, to the operation of the State Act"; and from *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 59, construing the same law, it appears that employees are presumed to accept the Texas plan of compensation unless they give written notice to the contrary.[1] The election of which Mr. Justice McReynolds spoke in the *Cook* case was again, therefore, implied rather than expressed, and, as in the *Winfield* case, could for that reason reach only those things about which the state might legislate directly. The same reasoning applies to the decision of the Texas Court of Civil Appeals in *Bell v. Southern Casualty Company*, 267 S. W. 531, in which, there being no actual contract, the Texas Act was held not to apply to a maritime tort.

The foregoing is, with the single exception noted below, a complete list of the cases on which the petitioner relies to invalidate his contract with the Railroad. At page

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[1] The portion of the Texas statute in question (Art. 8306, Sec. 3-a) is as follows:

> "An employee of a subscriber shall be held to have waived his right of action at common law or under any statute of this state to recover damages for injuries sustained in the course of his employment if he shall not have given to his employer, at the time of his contract of hire, notice in writing that he claimed said right * * *."

15 he cites *Mountain Timber Company v. Washington*, 243 U. S. 219, *Hawkins v. Bleakley*, 243 U. S. 210 and *New York Central Railroad v. White*, 243 U. S. 188, to establish, as they do, that "the states may absorb both employer and employee into state compensation, either with or without their consent," from which he draws the conclusion that "the argument that there is a difference between elective and compulsory compensation laws is of no force." Aside from the fact that the word "elective" normally describes a system that, unlike the Ohio law here in question, presumes consent in the absence of dissent, it is very clear that, because the states have power to enact either sort of compensation law, it does not follow that the effects of the two are identical.

Finally, it may be noted that, in arguing at page 16 and following that a proper construction of the contract signed by Gilvary excludes causes of action under the Safety Appliance Act, even though they occur in intrastate commerce, the petitioner raises a point that is not open to him here. The construction of the Ohio statute and the contract made pursuant to it raise questions for the Ohio courts, which they have already answered adversely to the petitioner's contention.

To the foregoing authorities relied upon by the petitioner, which as has been shown are inapplicable here, may be opposed decisions of this and other courts which, we submit, establish the correctness of the decision below.

Accurately stated, the questions presented by this aspect of the case are whether the State of Ohio, by its constitutional provisions and its statutes enacted pursuant thereto, may validly authorize a contract between an employer and an employee, by the terms of which the parties agree, upon adequate consideration and subject to the approval and supervision of the state, to a method of determining

the compensation payable upon the contingency of an accident occurring with or without fault in intrastate commerce, and whether the contract becomes inoperative if it is made to appear that the injury in intrastate commerce results from the use of equipment said to be defective or insufficient within the meaning of the Federal Safety Appliance Act.

The validity of the Ohio Compensation Act and of other similar acts has been upheld against attack. *Jeffrey Manufacturing Company v. Blagg*, 235 U. S. 571, *State ex rel. Yaple v. Creamer*, 85 O. S. 349; and see *New York Central Railroad v. White*, 243 U. S. 188, and *The Arizona Employers' Liability Cases*, 250 U. S. 400. In *Railroad v. Arnburg*, 285 U. S. 234, this Court held that the Massachusetts Workmen's Compensation Act was not invalid because it withdrew from interstate carriers who failed to comply with the act and pay the required premiums the defenses of the fellow-servant rule and assumption of risk as to accidents occurring in intrastate commerce. It was argued that to require interstate carriers to submit their intrastate business to the provisions of the act, or in the alternative lose the use of these defenses, placed a burden upon interstate commerce; but Mr. Justice Stone gave it as the opinion of the Court that the matter of compensation for injuries received in intrastate commerce was committed to the sole determination of the several states.

Several cases of maritime torts have presented questions analogous to that involved here. It is of course well-established that a state may not apply a compulsory compensation act to torts occurring within maritime jurisdiction. But where the state act required the express assent of the employer, and the acquiescence of the employee, before it purported to bind either of them, the Supreme Court of Maine has held that the existence of the contract between employer and employee brought a maritime in-

jury within the cognizance of the state law. *Berry v. Donovan*, 120 Maine, 457, 115 Atl. 250.

This Court has indicated that it will take the same view in cases where an express contract to accept the state act has been made. In *Northern Coal Company v. Strand*, 278 U. S. 142, the majority opinion written by Mr. Justice McReynolds intimated, and the special concurrence of Justices Stone, Holmes, and Brandeis stated, that an actual agreement between the parties to be bound by the provisions of the state law would be valid even as to a maritime injury otherwise beyond the jurisdiction of the local compensation act.

Finally, although the Federal Employer's Liability Act expressly forbids any contractual modification of the rights to which it gives rise, the Federal Safety Appliance Act contains no such prohibition. We submit that Gilvary by voluntarily making this express agreement, as authorized by the constitution and statutes of Ohio, has estopped himself from challenging the statutory remedy that his contract has provided. *Booth Fisheries Company v. Industrial Commission*, 271 U. S. 208. This remedy is open to him even now.

This Court has never held, therefore, that a state may not give express permission to its residents to make express contracts concerning their respective rights and liabilities in the event of injuries occurring in intrastate commerce, even when those injuries have resulted from violation of the Safety Appliance Act. On the contrary, the decisions of this Court and of other Courts indicate that such a contract is valid, and will be given full effect in a case like the present.

## II.

## IF THIS CASE WERE HEARD HERE UPON THE MERITS, IT WOULD BE DISPOSED OF UPON A GROUND THAT WOULD MAKE IT UNNECESSARY FOR THIS COURT TO CONSIDER THE VALIDITY OF THE CONTRACT PERMITTED BY THE OHIO ACT.

It is a well-established doctrine of this Court that legislation will not be invalidated, nor even called in question, unless it is susceptible of no construction that will avoid the constitutional difficulty, and unless the decision is necessary to the disposition of the case. *United States v. Jin Fuey Moy*, 241 U. S. 394, *Missouri Pacific Railroad v. Boone*, 270 U. S. 466; and see *Leathe v. Thomas*, 207 U. S. 93, *Hurdock v. Memphis*, 20 Wall. 590, 635, and *Cohens v. Virginia*, 6 Wheat. 264, 441. Among the several propositions that would be urged by the respondent in this Court, there is one involving no constitutional question which would require the affirmance of the decision below, and thus dispose of the case without reaching the problem of the validity and effect of Gilvary's contract.

As pointed out above, the only evidence of a defect or insufficiency in the couplers of the respondent's cars was their failure to couple at the time of the accident, while the cars were on the point of a ten-degree curve. Gilvary testified that he observed no defects; rigid inspection immediately after the accident disclosed none; and running tests then and on the following day gave perfect results. There was testimony that side play of four inches in the drawbars to which the couplers are attached is essential and universal to let cars go round curves in the track, and that the degree of lateral play in these particular cars did not exceed that limit. (R. 153, 172, 175, 177.) There was further uncontradicted testimony that when a coupling is attempted upon a curve as sharp as ten degrees, the couplers should be aligned, and that, in the event of failure to take this pre-

caution, their failure to couple by impact is no evidence that they are defective or insufficient. Gilvary admitted that he did not align the couplers. (R. 81.)

Three decisions of this Court bear upon the question whether a mere failure of the couplers to work by impact will take the case to the jury. In *Chicago, R. I. & Pacific Ry. v. Brown*, 229 U. S. 317, 330, the Court relied upon counsel's concession that this was enough, but did not decide the point. In *San Antonio Ry. v. Wagner*, 241 U. S. 476, the question was expressly reserved; and in *Atlantic City R. R. v. Parker*, 242 U. S. 56, the Court dealt with a case in some respects similar to this in such a way as to show that here the defendant should have had a directed verdict.

In the *Parker* case the only evidence that the couplers violated the Act was their failure to couple at the time of the accident, when the cars were on a curve. Mr. Justice Holmes, admitting that there were arguments the other way, held that there was enough evidence to take the case to the jury, for the following reasons: (1) while some lateral play must be allowed to drawheads, and while (2) the position of the cars on a curve might have tended to throw the couplers out of line, yet (3) on the record in that case the jury might have found the curve so slight that the track must be considered straight, and (4) so much lateral play as would prevent coupling in that event was ground for an inference that the couplers failed to comply with the Act. The clear inference is that where, as here, the jury is not warranted in considering the track straight, or the amount of lateral play excessive, mere failure to couple, when the car is on a curve, will not take the case to the jury, when explained by failure to align the couplers properly.

Thus, on the assumption that the petitioner's showing of a failure to couple automatically by impact made a prima facie case, that case was adequately rebutted by the de-

fendant's evidence. The situation is therefore within the rule laid down in *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, *Gunning v. Cooley*, 281 U. S. 90, and *Chesapeake & Ohio Ry. v. Martin*, 283 U. S. 209, and many other cases, that "it is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury may reasonably draw therefrom would be insufficient to support a different finding."

## CONCLUSION.

We believe that the decision of the Ohio courts in this case is not in conflict with the decisions of this Court or of other courts. We believe that the decision below upon the Federal question concerning the validity and effect of Gilvary's contract with the Railway is in accord with the applicable decisions of this Court. We believe further that if the case should be heard here upon the merits, other contentions which the Railway would urge would dispose of the controversy without the necessity of determining the validity of Gilvary's contract. For these reasons we submit that his petition for a writ of certiorari should be denied.

Respectfully submitted,

W. T. KINDER,

*Attorney for the Respondent.*

## APPENDIX "A".

The provision of the Ohio Constitution relating to the passage of a workmen's compensation act reads in its relevant parts as follows:

> "Article II Section 35. Workmen's Compensation. For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. *Such compensation shall be in lieu of all other rights to compensation or damages* for such death, injuries or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease * * *." (Italics inserted.)

Pursuant to the foregoing constitutional provision a Workmen's Compensation Act was passed, being Sections 1465-37-110, which among other provisions contains G. C. Sec. 1465-70, which provides:

> "*Employers who comply * * * shall not be liable to respond in damages at common law or by statute * * * for injury or death of any employe, wherever occurring, during the period covered by such premium so paid * * *, or during the interval of time in which such employer is permitted to pay such compensation direct.*" (Italics inserted.)

Section 1465-98 gives express authorization for contracts of the sort entered into between Gilvary and the Railway. Section 1465-98 is reproduced in full in the form of contract prepared by the Ohio Industrial Commission and signed by Gilvary, which is reprinted below, as follows:

"Form A-100

Note: This form, after being fully filled out, should accompany the 'Application for Classification of Premium Rating.' Form should also be filled out to cover each new employee.

THE INDUSTRIAL COMMISSION OF OHIO,
COLUMBUS, OHIO.

Section 51 of Compensation Act
(Section 1465-98 G. C.)

ACCEPTANCE AND NOTICE OF ELECTION BY EMPLOYER AND EMPLOYES UNDER SECTION 51 OF WORKMEN'S COMPENSATION ACT.

The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this Act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

To the Industrial Division of Ohio:

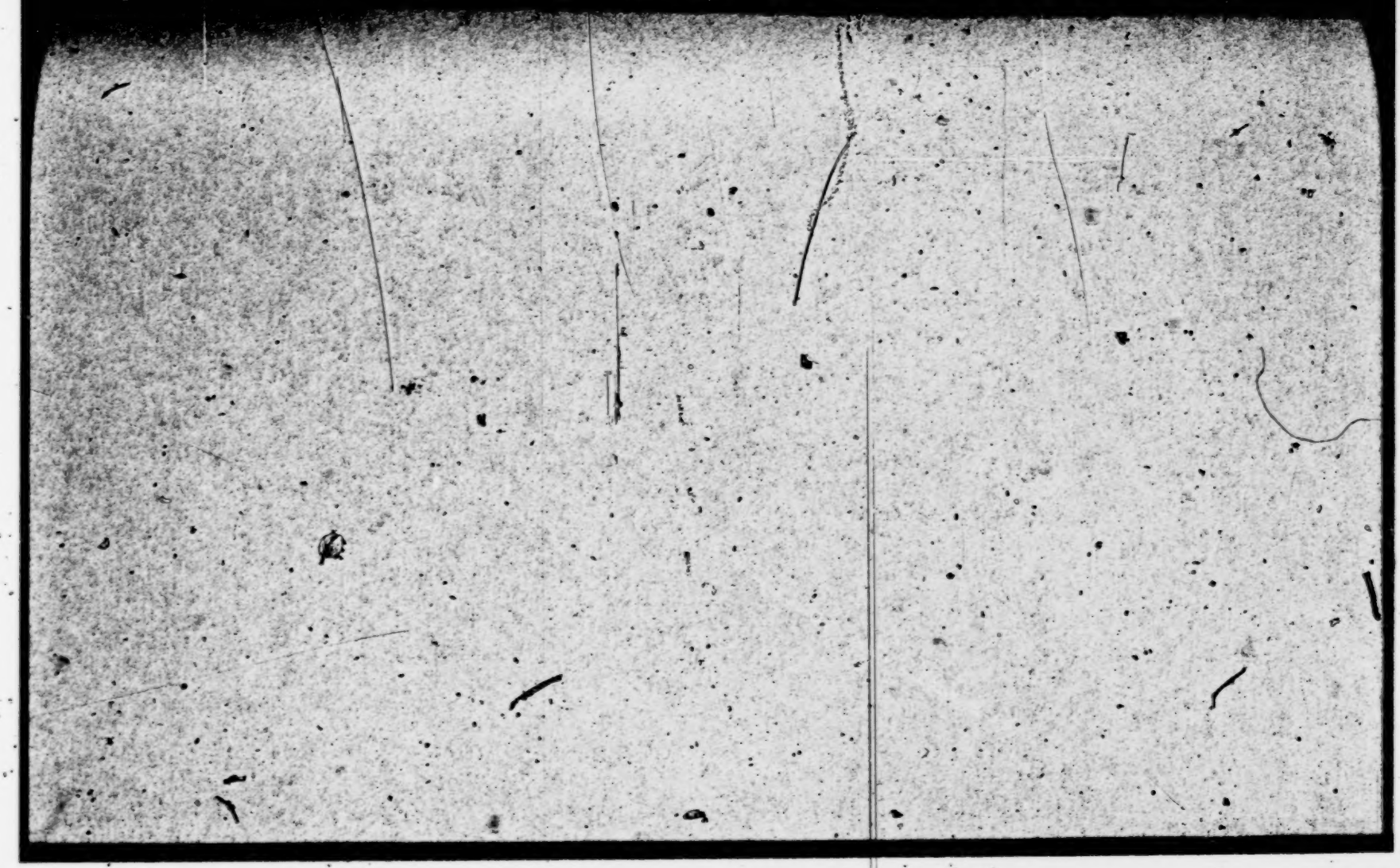
The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by

rail, and its undersigned employes, working only in this state, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, *hereby elect* that their *respective rights and liabilities* growing out of injury or death to such employes or any of them, or their dependents in case of death, *shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases* in which such injury or death is sustained while such employer or employes *are engaged in intrastate commerce.*

Said employer and employes hereby *severally request the Industrial Commission* of Ohio *to approve their election* to operate under the Workmen's Compensation Law of Ohio.

EMPLOYE: John Gilvary."

Oct. 12, 1928 (Italics Inserted.)



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In the Supreme Court of the United States

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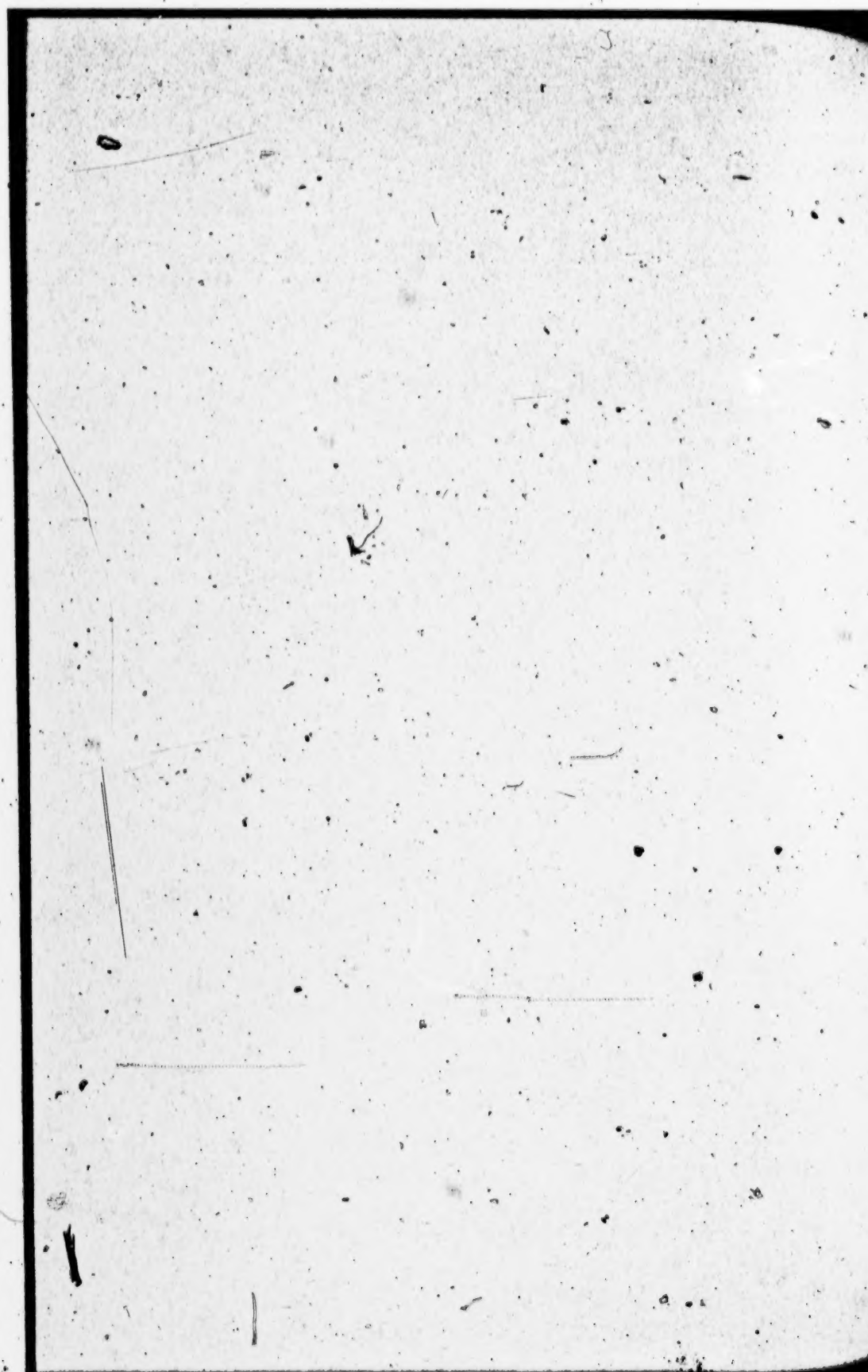

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## BRIEF ON BEHALF OF RESPONDENT.

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*Attorneys for Respondent.*

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# In the Supreme Court of the United States

**OCTOBER TERM, 1933.**

## No. 575.

JOHN L. GILVARY,
*Petitioner,*

vs.

THE CUYAHOGA VALLEY RAILWAY COMPANY,
*Respondent.*

## BRIEF ON BEHALF OF RESPONDENT.

### STATEMENT.

Petitioner and Respondent will hereinafter be referred to by name or as "plaintiff" and "defendant."

In view of the fact that, as indicated in defendant's brief on plaintiff's petition for certiorari, the record presents questions in addition to the validity of the agreement between plaintiff and defendant on which the judgment of the Ohio Supreme Court and Court of Appeals rest and with respect to which this Court granted certiorari, and which questions go to the right of plaintiff to recover in any event, we regard it essential that the case, including the facts, be treated in more detail than is done in petitioner's brief here.

## THE CASE.

Plaintiff was injured while in the employ of the defendant as a switchman, his injury arising out of the movement, or attempted movement, of certain freight cars within the plant of The Otis Steel Company. At the time of the accident both he and the defendant were engaged in *intrastate* commerce.*

Plaintiff's petition (Rec. 9) contained originally five assignments of negligence. At the trial (Rec. 40) four of these were withdrawn and plaintiff's case rests *solely* on the claim that his injury was caused by the alleged defective condition of the couplers of two of defendant's cars, which he as a brakeman was at the time engaged in coupling together.

The answer of the defendant (Rec. 12) tendered the following defenses: first: a denial that the couplers were defective; second: the assertion that plaintiff under the circumstances assumed the risk of the accident; and third: that—

> (a) at the time of the accident plaintiff and defendant were engaged in *intrastate* commerce, and (b) the State of Ohio by its Constitution, as amended and effective January 1, 1924, provided for a system of workmen's compensation and that such compensation—
>
> "shall be in lieu of all other rights to compensation or damages for * * * injuries * * * and that any employer who pays the premium or compensation provided in the law shall not be liable to respond in damages at common law or by statute for such injuries * * *." (c) that the defendant had in all respects complied with the Workmen's Compensation Law of the State of Ohio; and (d) that as permitted, but not

---

* Italics in this brief are those of respondent unless otherwise indicated.

compelled, by such law of Ohio the plaintiff and defendant had voluntarily entered into an express written agreement by which they had each agreed to accept and be bound by the provisions of the Ohio Compensation Law and that pursuant to such agreement they had filed a written acceptance thereof with the Industrial Commission of Ohio and which said written acceptance had been approved by said Commission.

Plaintiff's reply (Rec. 14), so far as it concerns the defendant's third defense, denied "for want of knowledge" (a) defendant's compliance with the Compensation Law and (b) denied further that he "at any time accepted the provisions of that law or subjected himself to the operation thereof." He further expressly averred that his action was founded upon "the Safety Appliance Act of the United States" and that the Compensation Law of Ohio was inoperative and also that the third defense did not constitute a defense to the petition. In view of the conceded facts (hereinafter appearing) with respect to defendant's compliance with the law and plaintiff's execution of the contract, the reply becomes merely a conclusion of law.

## THE FACTS.

Upon the issues thus made the facts of the case as developed on trial are as follows:

The defendant is in effect an intra-mill railroad, located within the plant of The Otis Steel Company in the City of Cleveland. By reason of the fact that it connects with certain trunk line railroads it engages upon occasion in interstate commerce, *i.e.*, in moving interstate consigned freight to and from the Otis Steel plant to its connecting trunk line railroads. Most of its work is, however, intrastate.

On the occasion of this accident, however, it was *not* engaged in interstate commerce but on the contrary it is conceded that operation in which Gilvary and the other members of his crew were engaged was *intrastate* in character and involved the movement of cars within the plant of The Otis Steel Company. It was in effect not only an *intra*state movement or an *intra*city movement but an *intra*plant operation.

The accident occurred at a curve on what is known as the east slab yard track. The three tracks involved known as the "running track," the west slab yard track and the east slab yard track, hereinafter called the "west" and "east" tracks, respectively. Their relative location, including the switches, are shown by a map—defendant's exhibit 1—and photograph defendant's exhibit 5. (Rec. 196A.) These tracks extend north and south, are parallel—the most westerly being the running track, the middle the west track and the most easterly being the east track. The right hand of the map is north, the left south. It will be noted that at the north end of the west track a switch connects the west track with the running track and the east track in turn runs into, by a switch, the west track.

There are two curves in this east track, one as it swings off the west track and one where it straightens out again. (defendant's exhibits 1 and 5.) The first curve is 20° 45′ in extent and the second, where the accident occurred, is 10° in extent. (Rec. 154.)

At and prior to the accident there stood on the east track several cars, the most northerly of which was a P. McK. & Y. loaded hopper car the north end of which was at the point of the second or 10° curve, about two car lengths (75 to 80 feet) from the switch leading into the west track. It was on to this car that the coupling was to be made. Gilvary's crew, of which he was the field man, consisted of Melvin, conductor, Skuce, head brake-

man, and Cornell, the engineer. The engine was headed north and had prior to the accident done some switching on the running and west track and had pulled down the west track with six cars attached, to a point to clear the switch on to the east track, it being there intended to back down into the east track and couple onto the standing P. McK. & Y. car. It was Gilvary's duty to supervise the making of this coupling and he had for that purpose come across from the west track and taken his position alongside (east) of the east track but at the northerly end of the P. McK. & Y. car while the engine with six cars attached had pulled north on the west track preparatory to backing up into the east track when the switch was thrown. Melvin threw the east track switch. The cut of cars moved slowly back (south), Melvin having signalled such movement, which was in turn relayed to the engineer by the head brakeman Skuce near the engine but about forty feet away (east) from the track.

The most southerly car of those attached to the engine and the one which was to couple on to the P. McK. & Y. car was a B. & O. gondola. Photographs of these cars are shown by defendant's exhibits 5, 6, 7 and 8. (Rec. 196A to 196D; the original photographs are available to the Court.)

It is at this point that the differences in fact between plaintiff on the one hand and the members of his crew on the other develop.

Gilvary's version is in substance to the effect that as the cars headed by the B. & O. car (the knuckle of the coupler of which was closed) came back and were within a half a car length of the P. McK. & Y. car (the knuckle of which was open) he gave a "steady" signal and as the cars came back he swung down, such signals according to Gilvary's claim being given by him directly to the engineer; that the coupling did not make but that the impact

having knocked back the P. McK. & Y. car he blocked this car and proceeded to open the knuckle which was closed in the coupling attempt and then signalled the engineer to again back up; that the cars came back and again failed to couple, the knuckle on the P. McK. & Y. car again closing. Gilvary testifies that he again blocked the P. McK. & Y. car but being then unable to open the knuckle with the lever he decided to go between the cars and *swing the engineer down*. Gilvary claims that the engineer *answered him by wave of the hand*; (Rec. 49, 76) that he, Gilvary, then went in between the cars, endeavored to open the P. McK. & Y. coupler by hand and being unable to do so attempted to line up the draw-bar and open the knuckle on the B. & O. car (the cutting lever of which was on the opposite side of the car) and that as he had his left arm about the draw-bar of the B. & O. car the train was moved back and his arm was caught between the coupler on the B. & O. car and the P. McK. & Y. car and he was thus injured. Plaintiff's testimony, in other words, is to the effect —and he expressly so testifies (Rec. 76, 77)—that the engineer, contrary to the exchange of signals, moved the cars back, thus causing the accident. We emphasize this in passing because if in law the negligence of the engineer was the proximate cause of the accident, and the disputed condition of the couplers merely the condition—*Lang. v. Railroad*, 255 U. S. 455,—no question would exist but that the agreement would bar recovery.

Opposed however to this version of the accident are the following facts tending to establish, among other things, that the couplers were not defective:

(a) Circumstantial evidence that by reason of the curve in the track (there being a slight down-grade south to the point of curve), the presence of a lumber pile alongside the track and the distance of the locomotive from the point of attempted coupling, it was a physical impossibility

for Gilvary to have seen the locomotive or transmitted signals directly to the engineer.

(b) The testimony of Melvin (Rec. 87), conductor, Skuce (Rec. 133), head brakeman and Cornell (Rec. 112), engineer, to the effect that the accident occurred in the following manner: That Melvin threw the switch for the entry of the cars in on the west track at which time Gilvary was at the P. McK. & Y. car; that Melvin's signal to back up was transmitted through Skuce, the head brakeman, to the engineer and that in response to the signal the cars came back; that—

> "just about the time the coupling was to be made, why, Mr. Gilvary swung down and went between the cars and then just as he gave the signal there was a kind of an impact. I don't know whether it was the train moved a little or whether it was just the cars came back from the slack that were in the cars. Mr. Gilvary came running out holding his hand." (Rec. 90, 91.)

Skuce, the head brakeman, standing out (east) from the track about forty feet so that he could see testifies that after Melvin gave the signal to back up, which he transmitted to the engineer, that after the coupling didn't make Gilvary gave a signal to stop, which he (Cornell) transmitted to the engineer; that at the time the train stopped Gilvary went in between the cars, came out, gave a signal to go ahead which he (Cornell) transmitted to the engineer, in response to which the engineer pulled ahead about six feet, stopped, at which time Gilvary went in between the cars; that then—

> "as near as I could figure out the slack from the rear of that track came back * * * then Melvin gave a wash-out signal * * * and I seen Melvin running and pretty soon he had a hold of Mr. Gilvary and brought him out * * *." (Rec. 137.)

Cornell, the engineer, says that he got the original back-up signal from Skuce, next receiving a stop signal and pursuant thereto stopped the engine, at which time he saw Skuce start to run towards the "hind end of the drag."

The testimony of Skuce, Cornell and Melvin is corroborated by a photograph showing the conditions obtaining at the time of the accident (Defendant's Exhibit 5) and discloses, as above indicated, that it was physically impossible for Gilvary and the engineer to have seen or transmitted signals directly to each other.

(c) Plaintiff testifies to no defect in either of these two couplers, his claim in that regard resting solely upon the fact that the coupling failed to make. Plaintiff in fact admits that he saw nothing broken or out of order with the standing P. McK. & Y. car. (Rec. 66.) He testifies to no observed defect in either coupler.

(d) The coupling was attempted at the point of a ten degree curve and Gilvary made no attempt prior to signaling the movement of the train back to adjust the draw-bars on either car to accommodate them to that curve although he was in charge of the coupling operation and could have stopped the movement at any time and knew when he signalled the movement back that the coupler on the Baltimore and Ohio car (the approaching car), was closed. (Rec. 64, 76.)

(e) Immediately after the accident Bawolak (Car Inspector) (Rec. 120 *et seq.*) at the direction of Keppers, yardmaster (Rec. 126 *et seq.*), and in his presence inspected both couplers, found them to be in "A No. 1 condition," the cutting lever operative and that the draw-bars (which are housed in a malleable iron "buffer casting") had the proper amount of side-play; that the cars were pulled apart, *both knuckles* were opened, the train moved back and the coupling made at the point of the ac-

cident. A written record of such inspection made forty-five minutes after the accident (defendant's exhibit 3) was offered by the defendant but upon objection by the plaintiff was excluded by the Court. Keppers participated in this inspection and corroborates Bawolak, as does Conductor Melvin, who was also present and in charge of the car movements.

Photographs of the Baltimore and Ohio coupler (defendant's exhibit 7), of the P. McK. & Y. coupler (defendant's exhibit 8) and of the two cars coupled together (defendant's exhibit 6) taken the following day show no defects.

(f) On the morning following the accident, *actual running tests were made which involved the actual coupling and uncoupling of these cars in practical operation* (there being three such tests made at different speeds). This examination and tests were conducted under the supervision of Thomas Murtaugh, Superintendent (Rec. 144), Brakeman Flieger (Rec. 146), Brechbill (Rec. 148) and Pintner (Rec. 149)—all experienced railroad men who described the tests, the condition of the appliances and all of whom testify that the couplers were not defective but in good condition.

(g) *Fitzgerald*, terminal trainmaster for the Erie Railroad, with forty-four years of railroad experience (Rec. 158); *E. O. Kerr*, yardmaster of the Nickel Plate, with thirty-two years' experience (Rec. 159), and *Gousley*, terminal trainmaster for the Baltimore & Ohio, with twenty-five years' experience (Rec. 163) testified as experts that under the facts of the case the failure of the cars to couple, in view of the curve, was no indication that the couplers were defective but that on the contrary it would be necessary on such a curve that the draw-bars of the cars be adjusted (sideways) by the brakeman to accommodate

the couplers to the curve. This evidence was not denied by any witness for plaintiff either as a part of his case in chief or on rebuttal.

In support of the third defense, *i.e.*, involving the Compensation Act of the State of Ohio, the record shows the following facts, which are conceded by the plaintiff (Rec. 201 *et seq.*):

1. That The Cuyahoga Valley Railway Company engaged in interstate and also intrastate commerce but that on the occasion of the accident both the plaintiff and defendant were engaged in *intrastate* commerce.

2. That on and prior to the date of the accident The Cuyahoga Valley Railway Company had complied with the so-called "Workmen's Compensation Law of the State of Ohio."

3. That there was on file with the Industrial Commission of Ohio an agreement known as the "Acceptance and Notice of Election by Employer and Employes Under Section 51 of the Workmen's Compensation Act," signed by the plaintiff, John L. Gilvary, and by the employer, The Cuyahoga Valley Railway Company.

4. That such agreement, known as "Acceptance and Notice of Election, etc." *had been filed with and approved by the State Liability Board of Awards*, now known as the Industrial Commission of Ohio.

5. That defendant's exhibit 2 is a true and correct copy of the agreement above referred to and is as follows:

"Form A-100

NOTE: This form, after being fully filled out, should accompany the 'Application for Classification of Premium Rating.' Form should also be filled out to cover each new employe.

# THE INDUSTRIAL COMMISSION OF OHIO
## COLUMBUS, OHIO.

Section 51 of Compensation Act.
(Section 1465-98 G. C.)

The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate and foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this Act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid.

Acceptance and Notice of Election by Employer and Employes Under Section 51 of Workmen's Compensation Act.

To The Industrial Division of Ohio:

The undersigned employer, being engaged in intrastate and also in interstate and foreign commerce by rail, and its undersigned employes, working only in this state, whose mutual connection with intrastate work is clearly separable and distinguishable from interstate and foreign commerce, *hereby elect* that their *respective rights and liabilities* growing out of injury or death to such employes or any of them, or their dependents in case of death, *shall be governed by the provisions of the Workmen's Compen-*

*sation Law of Ohio in all cases* in which such injury or death is sustained while such employer or employes *are engaged in intrastate commerce.*

Said employer and employes hereby *severally request the Industrial Commission* of Ohio *to approve their election* to operate under the Workmen's Compensation Law of Ohio.

Oct. 12 1928 EMPLOYE: John Gilvary."

This contract between Gilvary and the Railway Company was as to each entirely voluntary. We use the word "voluntary" both in the sense (1) that the Ohio statute, under the permission of which the contract was entered into, did not compel or require any such action by either the plaintiff or the defendant; and (2) that as between the parties, *i.e.*, the plaintiff as an employe, and the defendant as his employer, there is in this regard to be found no allegation, claim or fact to the contrary. Plaintiff's reply to the third defense of defendant's answer amounts, when considered in connection with the conceded facts, (Rec. 201, *et seq.*) to nothing more than a demurrer to the defense pleaded. He does not in his pleading deny the fact, as alleged in defendant's answer, that he and the defendant "voluntarily accepted the provisions of said Workmen's Compensation Law * * *." (Rec. 13.) In Ohio, by statute G. C. 11329, failure to deny constitutes an admission of a material averment. Nor does his testimony, either in chief or on rebuttal, contain any such denial. In fact his testimony contains no reference to the contract but by stipulation the plaintiff expressly concedes not only that he signed the contract or agreement but that it had been filed "and approved by the State Liability Board of Awards, now known as the Industrial Commission of Ohio."

Passing by for further discussion (1) the extent to which the plaintiff is bound by the approval of the Commission and (2) the consideration to each party supporting

this contract, we emphasize at this point the fact that the agreement here involved is voluntary both so far as concerns any authority of the State of Ohio and as concerns the parties, because running through the argument of plaintiff's brief is the premise, unsupported by the record, that in reaching this contract the parties were acting under some sort of compulsion. As shall be hereinafter demonstrated, no such compulsion existed, either under the terms of the Ohio Compensation Act or under the facts disclosed by this record.

Summed up, therefore, this agreement constitutes the voluntary act of an employer and employe, evidencing the considered acquiescence of the parties, both in law competent to so act, entered into by them under circumstances precluding the existence of any compulsion, imposition or misunderstanding and which bears the requested approval of the Industrial Commission of Ohio, an administrative body charged with jurisdiction in the premises. By such approval the state of Ohio in fact became a party to the agreement. The state's obligation in respect of the enforcement and administration of the benefits of the Act and the compensation thereby provided is treated elsewhere.

By (a) motions to direct a verdict made at the close of the opening statements of counsel, renewed at the close of plaintiff's case and at the close of all the evidence; (b) the proffer and exclusion of evidence; (c) the admission of evidence over objection; (d) exceptions to the refusal of the Court to give to the jury special instructions before argument and (e) exceptions to the general charge to the jury, the defendant raised and asserted and now asserts the following propositions:

**A—A voluntary written agreement entered into between the parties as permitted or authorized but not com-**

pelled or required by the law of Ohio, and at the instance of the parties approved by the State through its Industrial Commission bars this action and gives Gilvary his remedy under the Compensation law.

B—The defendant otherwise was entitled to a directed verdict in its favor because (1) the finding of the jury that there existed any defect in the coupler or couplers (the sole basis of the plaintiff's case) is not supported by the requisite degree of proof; and (2) the couplers, even if defective, constituted a condition as distinguished from the proximate cause of the accident, which if proximately due to acts (even if negligent) of plaintiff's co-employes are compensable only according to the agreement.

C—The defendant in any event is entitled to a new trial by reason of (1) the error of the court in (a) refusing to instruct the jury as requested by the defendant and (b) in the instructions given to the jury.

A—A voluntary written agreement entered into between the parties as permitted or authorized but not compelled or required by the law of Ohio, and at the instance of the parties approved by the state through its industrial commission bars this action and gives Gilvary his remedy under the Compensation Law.

The difficulty in the matter arises as the result of the assumption by plaintiff's counsel that the Ohio law "put employer or employe to an election as between Federal and state rights * * *." This is stated to be the "theory" of petitioner's brief (p. 34). But this is not true. The Ohio law does not so provide; and we turn to a discussion of this proposition, as follows:

1—The Ohio law;

2—The contract between the parties; and

3—The question of estoppel.

### 1—The Ohio law.

By express Constitutional provisions (Art. II, Secs. 34 and 35)[1] the State of Ohio has authorized the enactment "in respect of all employes" of laws having to do with hours of labor, minimum wage and the comfort, health, safety and general welfare. In addition thereto, by Sec. 35 of the same Article, the Constitution authorizes the enactment of laws providing "compensation to workmen and their dependents for death, injuries or occupational disease occasioned in the course of such workmen's employment," and the creation of a Workmen's Compensation Fund by compulsion of contribution thereto by employers. In addition to providing that compensation to an employe may be increased by an additional fifty per cent in the event of an injury caused by a violation of a safety requirement, this section of the Constitution contains the following provision:

> "Such compensation shall be in lieu of all other rights to compensation or damages for such death, injuries or occupational disease and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease."

Pursuant to this constitutional provision, the legislature of the state did enact a law providing for a system of workmen's compensation. G. C. Secs. 1465-37, *et seq.* The statute, the validity of which has been upheld against attack (*Jeffrey v. Blagg*, 235 U. S. 571; *Thornton v. Duffy*, 254 U. S. 361; *State ex rel. Yaple v. Creamer*, 85 O. S. 349, 97 N. E. 602) is in general similar to legislation of other

[1] These provisions together with references to certain applicable provisions of the Ohio Compensation Act are for convenience inserted in Appendix A hereof.

states, the validity of which has been sustained. *Railroad v. White*, 243 U. S. 188; *Arizona Employers' Liability Cases*, 250 U. S. 400; *Timber Co. v. Washington*, 243 U. S. 219; *Packing Co. v. Parramore*, 263 U. S. 418. Briefly, employers subject to the law are those which have in service three or more workmen and an employe under the Act is a workman of an employer employing three or more persons. G. C. 1465-60-61. Employments are classified and the premium rates therefor are fixed. Employers as may be financially qualified so to do may compensate their employes directly (Sec. 1465-69), otherwise the Compensation Fund is administered by the State Commission. Every employe, or his dependents in the case of his death, who is incapacitated by injury or occupational disease sustained in the course of his employment "wherever such injury has occurred" is entitled to compensation. Sec. 1465-68-a. Penalties are provided in respect of non-compliance by employers, both civil (1465-74) and penal (1465-69a). Claims for compensation awarded or any judgment obtained in any action prosecuted by the state under the Act is given the same preference as judgments rendered on claims for taxes (1465-77). Compensation is exempt from attachment and execution and in the event of insolvency of the employer the compensation awarded has the priority of taxes and costs. Sec. 1465-88. The attorney general of the state or prosecuting attorney of the county constitute the law officers charged with the institution and prosecution of any action necessary to the enforcement of the law. Sec. 1465-100.

All contracts insuring or indemnifying an employer against compensation liability are declared void. Sec. 1465-101.

The Act (G. C. 1465-70) further provides that—

> "Employers who comply with the provisions of the last preceding section * * * *shall not be liable to*

*respond in damages at common law or by statute* * * * for injury or death of any employe wherever occurring, during the period covered by such premium so paid * * * or during the interval of time in which such employer is permitted to pay such compensation direct."

Generally speaking the power of the state in the administration of the Act, the insurance of the payment of its benefits, the solvency of the fund, etc., is behind the system thus created.

We now turn to the provision of the Act (Sec. 1465-98) permitting a contract such as is here involved. This provision of the law appears on the face of the contract itself and is quoted in plaintiff's brief and is not here repeated. Its terms clearly evidence a studied effort on the part of the legislature to avoid any interference with the subject-matter of *interstate* commerce which had already been dealt with by Congress in the enactment of the Federal Liability Act. In substance and with respect to a railroad, the provisions of the Compensation Law of Ohio may by this section be made available upon the existence of certain conditions, to-wit: (a) where the employer is engaged in intrastate work "clearly separable and distinguished from interstate commerce * * *" (b) "then only" when the employer and employe—

"*with the approval of the State Liability Board of Awards* and so far as not forbidden by any Act of Congress, *voluntarily* accept the provisions of this Act by filing written acceptances, which when filed with and approved by the Board * * * shall subject the acceptors irrevocably to the provisions of this Act to all intents and purposes as if they had been originally included in its terms * * *. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid."

It is entirely obvious that there is here no attempt to apply the Act or any contract thereunder to interstate com-

merce and that the operation of the law is thereby limited to intrastate commerce. It is by express words made clear that the "*acceptance*" of the act by employer and employe is *voluntary* and in addition thereto must receive the *approval* of the State Liability Board of Awards (now the Industrial Commission, Sec. 871-1, *et seq.*). To state that this section puts "the employer and employe to an election" or to attempt to spell out of the provisions of this law any idea of coercion or compulsion by the state is, it seems to us, to ignore the plain meaning of the carefully employed language of the section. On the contrary the fact that the Act is in this regard entirely voluntary has been judicially recognized in decisions construing this particular section. *Connole v. Railroad Co.*, 216 Fed. 823, 825, 826; *State ex rel. Industrial Commission*, 100 O. S. 500, 504, 127 N. E. 595; *Hogan v. B. & O.*, 15 Fed. (2nd) 739. Here the Court of Appeals of the Sixth Circuit, on page 740, says:

> "The Act is elective but the right of election does not rest alone with the employer. The employe also has an option and his voluntary acceptance as well as the employer's must be approved by the Board of Awards. * * * Thus there is a discretion in the employe and the Board."[1]

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[1] Attention is called to the fact that the original Workmen's Compensation Act of Ohio of 1911 (102 Ohio Laws 524) amplified in 103 Ohio Laws 72, was elective in the sense that a non-complying employer was deprived of certain defenses in an action at law. *State ex rel. vs. Creamer*, 85 O. S. 349; 97 N. E. 602. In 1913 (103 Ohio Laws 72), pursuant to an amendment to the Constitution (Art. II, Sec. 35) adopted in 1912, the Act became compulsory in the sense that all employers were required to comply. *Industrial Commission vs. Weigandt*, 102 O. S. 1; 130 N. E. 38. Under G. C. 1475-98 enacted as a part of the 1913 statute, the present Compensation Law although compulsory is optional or elective as to the business of railroad operation and employer and employes engaged therein.

There is, therefore, in the Ohio law no provision which, by way of or through a statutory presumption, attempts to create a contract upon inaction by either party either with or without notice in respect of the provisions of the Act. In other words, there exists, under the provisions of the Ohio law, no compulsion of law *as law* under which the parties may be said to be bound upon failure to act. On the contrary, the Ohio law requires an affirmative voluntary act by the parties and the approval of its Commission. The "approval" of the Commission, in other words, the exercise by an administrative tribunal of a power conferred on it by the law, conclusively fixes, of course, as between these parties, any *fact* requisite to the Commission's exercise of such power and finding thereby made. *Phillips vs. Commissioner*, 283 U. S. 589, 600; *Mutual Film Corp. vs. Ohio Industrial Commission*, 236 U. S. 230, 245.

It follows, therefore, that it is not now open to either party to either question that the contracting parties were not an employer and employe within this statute or that their action in accepting the provisions thereof was not voluntary.

Every condition of this section is met by the conceded facts (Stipulation, Rec. 201), towit, the company and Gilvary, working only in this state, voluntarily and over their respective signatures, accepted the provisions of the Compensation Act by filing such acceptance (defendant's exhibit 2, Rec. 202) which in express terms (a) defines both plaintiff and defendant as being employe and employer of a character and status within the Act and (b) requests the Industrial Commission to approve such acceptance. Pursuant to such voluntary act by the parties, acceptance was filed with and received the approval of the Commission. The Company had complied with the Workmen's Compen-

sation Act, including payment of premiums based upon such acceptance.

Before reference to decided cases we turn now to—

**2—The contract between the parties.**

Disregarding the form of the contract, in substance it amounts to no more than an ordinary contract between plaintiff and defendant that each, in consideration of benefits secured thereunder and which otherwise would not be available, would forego certain rights which each party would, depending on future contingencies, otherwise have in the performance by each of the intrastate operations of the employer. The parties actually agreed that—

> "their respective rights and liabilities growing out of injury or death shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury or death is sustained while such employer or employees are engaged in intrastate commerce."

The agreement thus contained its own definition of its scope. The courts of Ohio in construing the Ohio statute permitting such a contract (G. C. 1465-98) have in this case held not only that this section authorized a contract which by its terms would include the surrender of a right of action under the Safety Appliance Act but also that the contract itself (which includes the section of the law involved) did include, and the plaintiff thereby surrendered, a right of action under the Federal Safety Appliance Act. It, therefore, follows that point 3 of petitioner's brief (pages 36, *et seq.*), that the contract did not include a right under the Safety Appliance Act is not now open to him in this Court.

The rule has been applied by this Court in respect of the construction placed upon the Ohio Compensation Act by the Ohio Supreme Court in *Thornton v. Duffy*, 254 U. S.

361, and with respect to the compensation law of Utah, *Packing Co. v. Parramore*, 263 U. S. 418.

The construction placed on a state statute as to a state matter is conclusive. *Quong Ham Wah v. Commission*, 255 U. S. 445.

The decision of the highest court of the state as to the construction of a statute and whether articles are included within its prohibition is accepted by this Court, which then determines whether the statute thus construed is valid. *Price v. People*, 238 U. S. 446; *Purity etc. Co. v. Lynch*, 226 U. S. 192; *Lindsey v. Gas Co.*, 220 U. S. 61, 73.

The power of a state court to determine the meaning of a statute includes the power to define its extent and limitations. *Sunday v. Kansas*, 196 U. S. 447. See also *Brinkerhoff etc. Co. v. Hill*, 281 U. S. 673, 680.

It seems, therefore, to us that the judgment below, in so far as it involves the meaning and construction of G. C. Sec. 1465-98, must be accepted here and the validity of the statute tested by the construction given it, which is necessarily that the statute included permission to the employer and employe engaged in intrastate commerce to voluntarily surrender a right under the Safety Appliance Act. The contract entered into under such statute was expressly so construed by the Ohio Court of Appeals, (Rec. 3) and this decision was affirmed by the Supreme Court. The contract included the statute (defendant's exhibit 2) and its construction as to what was included by its terms is a matter of local law, *i.e.*, the meaning, extent and terms of an Ohio contract expressly authorized by an Ohio statute. This is binding here. *Express Co. v. Kentucky*, 273 U. S. 269; *Michigan v. Trust Co.*, 286 U. S. 334, 343, 344.

In connection with the contract itself it is fair to consider the benefits acquired by each party under the contract and also the rights which each thereby gave up. The defendant is a railroad and in the operation of its business

in intrastate commerce (no right of the plaintiff arising out of an engagement in interstate commerce is affected by this contract) is aside from the Compensation Act regulated in respect of its liability to its employes in the event of injury and death by certain statutes. G. C. Sec. 6443, *et seq.* and G. C. Secs. 9015 to 9018. These for the purpose of this discussion may be assumed to be and are as a matter of fact similar to the provisions of the Federal Employers' Liability Act applicable to the liability of railroads to their employes engaged in interstate commerce. Negligence is an essential condition of recovery. Contributory negligence is a *pro rata* defense, except in the case of violation of a safety requirement. Assumption of risk is a defense except where the accident is contributed to by violation of a safety requirement and while, in substance, it is similar to that defense as it has been defined under the Federal Employers' Liability Act, there are certain situations in Ohio in which an employe may assume the risk of negligence of a fellow servant so that generally speaking the defense of assumption of risk in Ohio is of wider scope than that under the Federal Employers' Liability Act. Hence it may be said that an Ohio railroad employer in respect of an accident occurring in intrastate commerce is liable only in the event of negligence and in addition thereto may plead the defense of contributory negligence and assumption of risk, but if negligent and no defenses appearing, is subject to liability in an amount fixed by the particular jury and dependent upon the extent of the injuries. Conversely, an employe of such an employer, engaged in intrastate commerce may not recover unless the injury sustained by him was occasioned by negligence and even here if he be also free from contributory negligence (a *pro rata* defense) and free from a knowledge of the hazard which permits the application of the doctrine of assumption of risk. He has,

however, once liability is established, the right to a verdict at the hands of a jury, depending on the injuries. For any injury sustained by him, or in the event of his death—the result of no negligence or if the result of negligence the risk of which he assumed—neither he nor his dependents in the event of his death are entitled to recover.

It is this sort of a situation and upon the reasons flowing therefrom that compensation laws have been passed in forty-four states of the country. In fact the advantages and benefits of workmen's compensation legislation as applied to railroads over a system furnished by a statutory regulation of employers' liability, *e.g.*, the Federal Employers' Liability Act, have been stressed in a recent (January, 1934) number of the *Harvard Law Review*, where in an elaborate discussion of the matter in an article entitled "Workmen's Compensation on Interstate Railways" there is advocated the repeal of the Federal Employers' Liability Act, with the consequent transfer of the subject-matter thereby regulated (liability in interstate commerce) to the states for administration under their respective compensation laws.

The matter has been the subject of comment by this Court in *Railroad v. White*, 243 U. S. 188, where on pages 201 *et seq.* are considered the advantages to the employer and employe of a method of state compensation. It clearly follows that the advantages and disadvantages of the common law or statutory regulation of liability constitutes adequate consideration for a contract of this character. In addition thereto, under the Ohio law, the employe and his dependents acquire protection as against disability and death due to an occupational disease for which there was no liability prior to the enactment of the present compensation law. *Commission vs. Brown*, 92 O. S. 309, 312; 110 N. E. 744.

No decision has intimated that, if an employe possesses a cause of action against a railroad for a violation of the Federal Safety Appliance Act, he may not voluntarily release it, by contract upon good consideration, which derives its force from the law of the State where it is made. There is no difference in principle between such a release after the fact, and an agreement made beforehand upon good consideration, fixing a fair and equitable means whereby injuries, both negligent and non-negligent, which might otherwise give rise to causes of action under the Safety Appliance Act, may be compensated for.

Gilvary's contract upon which the Railway relies does nothing more than this. He voluntarily agreed in express words to forego other rights of action that might have accrued to him, in favor of a quick, certain and equitable method of compensation for all injuries, including occupational disease, whether or not attributable to his employer's fault, that arose in the scope of his employment in intrastate business. From the date of the agreement, October 12, 1928, until April 17, 1929, when disabled by his accident, he enjoyed its benefits in the sense that there was available to him or his dependents compensation for injuries received irrespective of fault. The Ohio statute did not compel him or the Railway to enter into such an agreement; it put neither of them to their election; it merely expressed what would otherwise have been implied from the general principles of the common law, that such a contract was wholly legal, and subjected it to the approval of the Ohio Industrial Commission to insure its fairness. This action by the Commission was invoked by plaintiff as well as defendant.

Accurately stated, the questions presented by this aspect of the case are:

May the State of Ohio, by its constitutional provisions and its statutes enacted pursuant thereto, validly authorize

a contract between an employer and an employe, by the terms of which the parties agree, upon adequate consideration and subject to the approval and supervision of the state, to a method of determining the compensation payable upon the contingency of an accident occurring with or without fault in intrastate commerce, and whether the contract becomes inoperative if it is made to appear that the injury in intrastate commerce results from the use of equipment said to be defective or insufficient within the meaning of the Federal Safety Appliance Act?

In the recent case of *Railroad v. Armburg*, 285 U. S. 234, this Court had occasion to declare the extent of state authority in respect of the enactment of a compensation law and its application to a railroad as employer. To the contention of the company that the act although sought to be applied as to an intrastate matter was an interference with interstate commerce, this Court held that the matter of compensation for injuries in intrastate commerce was committed for the sole determination of the several states. We quote from the opinion by Mr. Justice Stone as follows:

> "The enactment of workmen's compensation acts is within the legislative power of the State. *Mountain Timber Co. v. Washington*, 243 U. S. 219, 238, 239; *Madera Sugar Pine Co. v. Industrial Accident Commission*, 262 U. S. 499, 501, 502, * * *."
>
> "*The interstate commerce clause did not withdraw from the States the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it. Sherlock v. Alling*, 93 U. S. 99, 103; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 26; *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U. S. 45, 52; *Chicago, Milwaukee & St. Paul R. R. Co. v. Solan*, 169 U. S. 133, 137, 138.
>
> Although by the Federal Employers' Liability Act the regulatory power of the National Government over interstate commerce has been extended to the em-

ployes of interstate rail carriers, *it has not excluded the exertion of State power over their employes while engaged in a service not involving interstate commerce.* See *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558.

The liability of the carrier to its employes when so engaged *is controlled by state law*; see *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473; *Wabash R. R. Co. v. Hayes*, 234 U. S. 86, 89, 90; *and thus remains within the scope of the State legislative power to regulate the relations of master and servant. Chicago & Eastern Illinois R. R. Co. v. Industrial Commission of Illinois*, 284 U. S. 296." (Italics ours.)

Conversely, this Court has held that Congress has confined its regulation in this regard (Federal Employers' Liability Act) to cases arising in interstate commerce. *Railroad v. Behrens*, 233 U. S. 473.

If, as the *Arimburg* case clearly establishes, the State of Massachusetts may provide a compensation remedy for employes of a railroad engaged in interstate and intrastate commerce, *where the injury is sustained by the employe in intrastate commerce*, it certainly follows that the State of Ohio, *which does not go so far*, can *authorize* a contract whereby an employe and his employer may voluntarily agree to be governed and controlled by the Ohio Compensation Act in respect of injuries sustained in *intrastate* commerce.

No Act of Congress prohibits such a contract. The Federal Employers' Liability Act, it is true, expressly forbids any contractual modification of the rights to which it gives rise but such act has no application here. The Safety Appliance Act contains no such prohibition. It is confined in its express language to the establishment of a standard of duty. It expressly conferred no right of action and while such right arises by implication (*Railway v. Rigsby*, 241 U. S. 33) it seems quite impossible to go further and

read into the Act itself for the purpose of this case a prohibition against a voluntary contract of the sort here under consideration. On the contrary the very absence of such a provision, in view of an express provision in the Federal Employers' Liability Act, fairly supports our contention that Congress by the Safety Appliance Act not only did not prohibit such a contract but also did not intend so to do. It seems entirely enough to say that the Safety Appliance Act creates a standard of duty and gives a right of action in event of its violation to the damage of another. To put the right of action thus created beyond the power of the holder or potential holder thereof to contract with respect thereto seems to us to go far beyond the words and intent of the statute and to put beyond reach of the employe the right to contract about such right either before or after his cause of action accrued would, of course, in effect make of the persons for whose benefit the statute was passed, wards of the Federal Government, without whose approval or a substitute court action, no contract affecting such right could be valid. To push the matter thus far might be to encounter the provisions of the Fifth Amendment. *Adair v. United States,* 208 U. S. 161; *Atkins v. Hospital,* 261 U. S. 525. We have already pointed out that there is no difference in principle between a contract before the fact and one afterwards, providing the former is supported by good consideration and legal under the law of the state having, as here, jurisdiction to act in the premises, to-wit, the matter of compensation for an injury arising out of intrastate commerce.

We concede that the Safety Appliance Act affords a standard of duty and that its violation creates a right of action in one injured thereby even though he at the time is engaged in intrastate commerce, *Railway v. Rigsby, supra,* but we deny that the statute does more than that or that there is any other statute of Congress that adds to

that result.[1] If this is so, there is no obstruction to the right of plaintiff to contract either in respect of his rights under the Act, either potential or actual, particularly where, as here, he is permitted to do so voluntarily but with the state's approval.

Even a constitutional right may be waived. *Booth Fisheries Co. v. Industrial Commission,* 271 U. S. 208; *Daniels v. Tearney,* 102 U. S. 415; *Grand Rapids etc. Railway Co. v. Osborn,* 193 U. S. 17. This is the rule in Ohio, where "a citizen may waive a constitutional right." *Byers vs. Printing Co.,* 84 O. S. 408, 422, 95 N. E. 917. See also *Tone v. Columbus,* 39 O. S. 281. The rule was applied by the Ohio Supreme Court with respect to the first compensation act, then elective in form. *State ex rel. v. Creamer,* 85 O. S. 349, 97 N. E. 602. The present act is, as heretofore pointed out, elective as concerns this plaintiff and defendant—this because of the provisions of the Act itself. G. C. 1465-98.

This Court has never held that a state may not give express permission to its residents to make express contracts concerning their respective rights and liabilities in the event of injuries occurring in intrastate commerce, even when those injuries have resulted from violation of the Safety Appliance Act.

Indeed, in considering the validity of a compensation act (Texas), where compliance with which was optional with the employer and upon his compliance binding on employe if he stays in the employment after notice of his employer's act, this Court held that such arrangement did not invalidate the law as a denial of equal protection of law, and Mr. Justice Pitney gave it as the opinion of the Court, in *Middleton v. Light Co.,* 249 U. S. 152, that

> "The relation of employer and employee being a voluntary relation, it is well within the power of the State to permit employers to accept or reject the new

[1] Compare *Moore vs. Chesapeake & Ohio Railway,* decided by this Court Feb. 5, 1934.

plan of compensation each for himself as a part of the terms of employment, and in doing so there was no denial to employees of the equal protection of the laws within the meaning of the Fourteenth Amendment."

While the precise point has not been passed upon by this Court, there do exist decisions of this and other courts which, we submit, establish the correctness of the decision below.

A contract reached under the compensation act of one state has, for example, been held enforcible as a limit of obligation or liability even though the accident occurred in another state whose law in respect of the occurrence would otherwise ordinarily control as a measure of obligation. *Bradford Elec. Co. v. Clapper, Admx.*, 286 U. S. 145. This decision, it seems to us, is persuasive in the case at bar in so far as it recognizes and enforces a contract status reached under a compensation act. The defendant here, is, like the petitioner in the *Clapper* case, interposing a right by way of defense to the liability claimed by the plaintiff—a right which, we submit, accrued under a statute which, as there, left no room for construction. It is true that the *Clapper* case involved considerations other than here appear which prompted the enforcement of the Vermont law, but on principle it is difficult to see that the right asserted by plaintiff under the Safety Appliance Act occupies any more substantial position than the right claimed by Clapper's administrator to the benefit of the New Hampshire law.

We turn now to decisions in another situation which is analogous, *i.e.*, those involving admiralty jurisdiction. The result in these cases support our position, particularly as it is to be remembered that under Art. III, Sec. 2 of the Constitution, the United States is given exclusive jurisdiction of admiralty and maritime matters, while in

cases involving, as here, matters relating to commerce the Federal jurisdiction is founded on interstate commerce, the state possessing under its reserved power jurisdiction over commerce within its borders. In admiralty matters, while the states have been given some field of action it has been only on the ground that the action thus exerted did not materially invade the Federal power. See *Grant, etc. Ship Co. v. Rohde*, 257 U. S. 469; *Millers, etc. Co. v. Braud*, 270 U. S. 59, 64; *Smith & Sons v. Taylor*, 276 U. S. 179. It has long been recognized that the states otherwise had no jurisdiction in such premises, particularly where compensation law *as law* was sought to be applied. *Employers Liability Corp. Ltd. v. Cook*, 281 U. S. 233; *Baizley Iron Works v. Span*, 281 U. S. 222, and *Southern Pacific v. Jensen*, 244 U. S. 205. Putting aside for the moment reasons why those authorities relied upon by plaintiff are inapplicable here, in the following cases it is indicated that a voluntary contract would be enforced even in face of this state of the law. *Northern Coal Co. v. Strand*, 278 U. S. 142.

Here plaintiff's decedent was a stevedore and killed during the unloading of a vessel at a dock, and therefore, in maritime employment. The question involved the Wisconsin Compensation Law, the remedies of which Strand's widow sought to invoke. The Wisconsin Act contained provisions in the nature of presumptions of compliance upon certain conditions. This Court held the Compensation Law inapplicable under those circumstances but the majority opinion, written by Mr. Justice McReynolds, intimated and the special concurrences of Justices Stone, Holmes and Brandeis stated that an *actual* agreement between the parties to be bound by the provisions of the state law would be valid even as to a maritime injury otherwise beyond the jurisdiction of the state law. Mr. Justice McReynolds (page 145) found—

"nothing in the record to indicate that when contracting with its stevedores the Dock Company *actually agreed* to subject itself to the liabilities imposed by the State Compensation Act."

And Mr. Justice Stone, with whom Justices Holmes and Brandeis concurred, said in part, pages 148-149:

> "The state act here is contractual, as we have held in *Booth Fisheries Co. v. Industrial Commission*, 271 U. S. 208, and the employer *is bound* to pay a compensation in accordance with the schedules of the act *because the parties have agreed that they shall apply rather than the common or any other applicable law.* * * *. To me it would seem that the rights of parties who have thus stipulated for the benefits of a state statute in an essentially maritime employment are not on any theory controlled by the maritime law or within the purview of *Southern Pacific Company v. Jensen*, 244 U. S. 205; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Washington v. Dawson & Co.*, 264 U. S. 219. * * * *Recovery in a state court upon an insurance policy* upon the life of a seaman for death occurring on a ship on the high seas while in the performance of his duties *would not, I suppose, be deemed to have that effect or be precluded by the admiralty law even though some of the provisions of the policy were imposed by state statute.*"

The Supreme Court of Maine in *Berry v. Donovan*, 120 Maine 457, 115 Atl. 250, considered the question the existence of which was suggested in the *Strand* case, *supra*. Here Berry, a longshoreman, was injured while engaged in the operation of unloading a vessel moored to a Portland dock. Plaintiff at the time of the accident was on the platform on the dock, to which platform the cargo was being unloaded from the vessel by a traveling derrick. Berry was injured when he was struck by the sling of the derrick. He made application for compensation under the Maine law. His employer resisted the application on the ground that the Maine law if thus applied was invalid in

view of the admiralty jurisdiction of the United States. The Maine Act was optional or elective. It required the express assent of the employer and the approval of the Commission. The employe assents unless he gives notice to the contrary. The Court found the contract existed and enforced it.

We quote for convenience as follows (Reporter, p. 253):

> "His [employe's] attitude is that he and his employer, enjoying constitutional freedom to contract, voluntarily put aside rights and obligations otherwise vouchsafed them, and therefore substituted the new form of compensating industrial injuries which the Legislature of their state has provided. Having done this and injury having befallen the plaintiff out of and in the course of his employment, he insists that this court make their contract to square with the demands of real justice and plain common sense, that his rights in the dual citizenship of state and Union may not be unjustly infringed, and that the remedial legislation out of which the contract sprang may be judged by what it achieves in satisfying the righteous demand of society for a justice that is exact, equal and full."

And again, page 254:

> "No reason is perceived why it would not be quite as competent for them to fix upon a mode for determining when, where, and the extent to which money relief or compensation should be forthcoming in the event of accident, as it would be for them, after the happening of an accident, amicably to make adjustment of damages or to submit the question to the determination of a common-law arbitration, or for the injured one to waive his right to damages, or for the other to make him an award therefor—no legal liability existing. * * *. Employer and employe mutually substitute for rights and liabilities which the law would imply from the contract of hiring other rights and liabilities *made effective by a state-sanctioned contract*

> *of their own making*, entered into to remove the uncertainties of possible lawsuits. * * *. In this rigorous climate, where the winds of common sense blow free and strong, that contract seems anchored secure within a safe legal haven.
>
> * * * Under a compulsory statute, the rights and liabilities of parties arbitrarily arise from the law. *Under an elective statute they come into existence from contract.* * * *. The Legislature of the State of Maine has not presumed to encroach or trench upon a power which the people of the United States conferred upon the nation. *The Legislature has confined itself to the enactment of a law intended to operate only in those instances where its provisions are voluntarily contractually adopted*, and operative solely by the procedure of the statute on which the adoption is bottomed. *A contract founded on that law is of right entitled to the rights of a contract universally.*"

The same rule is established in Oregon (*West v. Kozer*, 104 Ore. 94; 206 Pac. 542). In this case the Supreme Court of Oregon considers that this Court held as much in *Grant etc. Ship Co. v. Rohde*, 257 U. S. 469, saying:

> "It will be observed that the last paragraph in the opinion practically concedes, that, but for the fact that the parties had elected to come under the provisions of the Compensation Act, the jurisdiction in admiralty would have existed, which is what the petitioners contend here."

*Rickert v. Commission*, 122 Ore. 565, 259 Pac. 205; *Shea v. Commission*, 118 Ore. 642, 247 Pac. 770. In these cases, while it is pointed out that decisions of this Court have permitted the states a field of action when the general purposes of the admiralty law are not involved, the voluntary acceptance under the particular compensation act has been enforced in matters clearly maritime. See also *Millers, etc. Co. v. Boudreaux*, 261 S. W. 137, affirmed 270 U. S. 59; *Travelers Ins. Co. v. Bacon*, 30 Georgia App. 728, 119 S. E. 458.

In *Jordan v. Leylund & Co., Inc.*, 7 Fed. (2nd) 386, (D. C. Louisiana) the Court, in passing on the effect of the maritime jurisdiction of the United States as it related to the provisions of the Louisiana Compensation Law, holds in effect that a specific contract between employer and employe entered into before the accident, adopting the state law as the measure of their respective rights, would govern, to the exclusion of the remedy of the maritime law, and that such conclusion was not in conflict with *Southern Pacific Co. v. Jensen, supra*, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, both of which are relied upon by plaintiff.

We turn now to the authorities upon which petitioner relies. In this connection we submit that what has gone before has served to establish (a) that the contract or agreement between the parties here was a voluntary one, entered into without any compulsion either so far as the state law is concerned or as between the parties themselves; and (b) that the voluntary contract, having the sanction of the state, is in all respects fair and supported by adequate consideration.

To give effect to such contract according to its terms conflicts with none of the decisions that petitioner cites. Pages 8 to 26 of petitioner's brief are devoted to establishing that "causes of action accruing to railroad employes are not subject to state systems of compensation." But this does not reach the point of the instant case. The Ohio law does not purport to regulate or define the duty of the defendant with respect to the condition of the couplers on its cars nor does it attempt expressly or by implication to modify, regulate, disturb or defeat the cause of action arising by non-compliance with that Act. It contains no compulsion of law *as law* which tends to interfere with the enforcement of the Safety Appliance Act. It does no more than permit the employe, while engaged in work of which

the state has jurisdiction, to contract with reference to any right he may enjoy under favor of the Safety Appliance or any other Act and thereby receive other equivalent benefits the existence of which has been judicially recognized by this and other courts, including those of Ohio.

*Texas & Pacific Railway v. Rigsby*, 241 U. S. 33, decided that an employe whose injury was occasioned by a defective grab-iron while he was engaged in an intrastate movement had a right of action under the Safety Appliance Act. The Court held that in this respect interstate and intrastate commerce were so intimately blended that Congress might regulate both. Although no conflicting state law was involved, Mr. Justice Pitney, arguendo, used the language quoted at page 9 of the petitioner's brief, and indicated that state law might not interfere with such regulation. He spoke only of the inability of a state to enforce an inconsistent law as law. No syllable of his opinion casts doubt on its right to let the parties contract as they choose.

*Ross v. Schooley*, 257 Fed. 290 (C. C. A. 7), is an illustration of the principle expressed by the dictum of Mr. Justice Pitney in the *Rigsby* case. The employe was hurt by a defective coupler while engaged in intrastate commerce. The parties had made no agreement as to their rights and the court held that, as between the conflicting laws the Federal Act controlled. Again the issue was the compulsion of the law as such, and not the right of the parties to agree on methods of compensation.

In *Ward v. Erie Railroad Co.*, 230 N. Y. 230, 129 N. E. 886, Mr. Justice Cardozo, whose language is quoted at page 13 of the petitioner's brief, was dealing again with the claim that the New York Compensation Act of its own force superseded the Federal law. That the Safety Appliance Act does not depend for its efficacy on the pleasure of the state is undoubted, but that proposition does not forbid the parties to agree as to their rights.

In *Director General of Railroads v. Ronald*, 265 Fed. 138 (C. C. A. 2), the court was considering the right of action possessed by a railroad employe, whose injury from a violation of the Federal Safety Appliance Act occurred while he was engaged, as a majority of the court held, in interstate commerce. The New York Compensation Act contained a clause much like that of the Ohio Act, providing that the act should apply in intrastate commerce only in so far as accepted by both parties. But, as has been seen, (a) a majority of the court thought that interstate commerce only was involved; (b) it nowhere appears that the parties in fact contracted that the New York Act should govern; and (c) when the case was argued in the Federal Courts there was not, as here, a decision of the State Courts applying such contracts to cases under the Safety Appliance Act. The dicta of Judge Manton (concurring opinion) quoted by the petitioner at page 26 therefore resolve themselves into the conclusion that as a matter of statutory construction the New York law is inapplicable to intrastate transactions involving the Safety Appliance Act—a conclusion that is irrelevant here, in the face of the binding construction given to the Ohio contract by the Ohio courts.

We also call attention to the fact that while, according to Judge Manton's opinion (page 144), the New York Compensation Act contained a provision quite similar to the Ohio provision (G. C. 1465-98) (extending permissive right of agreement), Judge Manton gives in effect as one of the reasons for the non-application of the New York Act the fact that the parties in that case had not acted under the permissive power contained in the section.

*New York Central Railroad Company v. Winfield*, 244 U. S. 147, is of course inapplicable here, because it only decided that, as to injuries occurring in interstate commerce, New York might not superimpose liability for non-

negligent injuries upon the liability for negligent injuries resulting from the Federal Employers' Liability Act.

*Southern Railway v. United States*, 222 U. S. 20, *Southern Railway v. Commission*, 236 U. S. 439, do nothing more than establish that which is unquestioned here, that Congress could validly regulate the matter of safety appliances and having done so the regulation is exclusive in so far as concerns the power of the state to interfere in respect of the subject-matter of the law. *Houston etc. Railway Co. v. United States*, 234 U. S. 342; *Railroad v. Interstate Commerce Commission*, 221 U. S. 612; *Second Employers Liability Cases*, 223 U. S. 1; *Charleston, etc. Railway v. Furniture Co.*, 237 U. S. 597; *Napier v. Railway Co.*, 272 U. S. 605; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, are examples of the well established rule that within the field of which it possesses power such as matters relating to liability of railroads to employes in interstate commerce and the regulation of rates in interstate commerce, laws enacted by Congress are entitled to exclusive effect as against attempted state regulation in that regard.[1]

No decision of state courts cited in petitioner's brief, pages 14, 15 and 16, affects the question here. In none of those cases, so far as we can find, was any express voluntary contract involved, whether the state compensation act was compulsory or elective. It is, of course, clear that merely because an act is elective in the sense that an employer may or may not *comply* with its terms does not mean the existence of an actual voluntary contract between the complying employer and his employe. As will be later seen, a compensation act may make no provision for such a contract. Most of them do not. Some attempt to impose

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[1] Even where federal regulation has existed with reference to the same subject matter this Court has held state laws enforcible. Numerous instances are listed in Appendix B hereof.

or declare a contract between the parties by a presumption on action or non-action after notice, but this is not here the fact.

Petitioner's second proposition (pp. 26 to 36 of petitioner's brief) is addressed to establishing that—

> "the states are without power to put the parties to an election such as was exacted in the instant case."

Enough has been said to demonstrate, we submit, that the assumed premise of such argument, to-wit, that the State of Ohio put the plaintiff and defendant here to an election, does not in fact exist. In other words, no agreement or election was here "exacted," nor does the Ohio Act provide for such exaction or contain within its terms any compulsion as far as the parties are concerned. The section in question (1465-98) demonstrates this and, as heretofore pointed out, it has been thus judicially construed. *Hogan v. Railroad*, 15 Fed. (2nd) 739; *Connole v. Railroad Co.*, 216 Fed. 823; *State ex rel. v. Industrial Commission*, 100 O. S. 500, 127 N. E. 595. The authorities cited by the plaintiff, *Director General v. Ronald*, *Railway v. Winfield*, and *New York Central Railroad v. Winfield*, having to do with the application of compensation laws in respect of regulation by Congress of liability in interstate commerce, do not, obviously, touch the question here presented. Petitioner points, however, to decisions of this and other courts on the question of the application of workmen's compensation acts as such to the field of admiralty jurisdiction and cites authorities, of which *Employers Liability Cases, Ltd. v. Cook*, *Baizley Iron Works v. Span*, *Southern Pacific Co. v. Jensen*, *Knickerbocker Ice Co. v. Stewart* are examples. But these decisions do not help the petitioner's case. The "elective" state compensation acts there in question that were not permitted to apply to maritime or other transactions to which a compulsory act could not apply, have with-

out exception provided that the parties should be bound by them, in the absence of an expressed dissent. In other words the State makes or attempts to make the contract for and between the parties. An act drawn in this form can be said not to rely upon contract in the same sense as the Ohio Act. A state may imply a contract from the silence of the parties only in so far as it could have bound them directly by compulsory act. *Erie Railroad v. Winfield*, 244 U. S. 170. As regards the extent of the operation permitted, therefore, "elective" compensation acts of this type do not differ from compulsory acts. No inference can be drawn, therefore, concerning the scope which will be allowed to an actual contract between the parties from the decisions imposing limitations upon elective acts of this sort.

In *Baizley Iron Works v. Span*, 281 U. S. 222, a case involving a maritime tort, "the Pennsylvania statute declares that there shall be a conclusive presumption that both employer and employee accept its provisions unless one of them makes a written statement to the contrary."

The petitioner relies particularly on *Employers' Liability Co. v. Cook*, 281 U. S. 233, a maritime case involving the extent of the operation of the Texas Compensation Act. Under the Texas Act it appears from *Miller's Indemnity Underwriters v. Braud*, 270 U. S. 59, that employes are presumed to accept the plan of compensation unless they give written notice to the contrary.[1] This we assume to be the

[1] The portion of the Texas statute in question (Art. 8306, Sec. 3-a) is as follows:

"An employee of a subscriber shall be held to have waived his right of action at common law or under any statute of this state to recover damages for injuries sustained in the course of his employment if he shall not have given to his employer, at the time of his contract of hire, notice in writing that he claimed said right * * *."

basis of the statement in petitioner's brief (p. 28) that "both had elected" within the meaning of the local law. There was obviously no actual contract and in fact the Texas Act, so far as we can find, makes no provision for an "actual voluntary contract" and it follows that the election of which Mr. Justice McReynolds spoke in the *Cook* case was, again, therefore, implied rather than expressed, and, as in the *Winfield* case, could for that reason reach only those things about which the state might legislate directly. The same reasoning applies to the decision of the Texas Court of Civil Appeals in *Bell v. Southern Casualty Company*, 267 S. W. 531, in which, there being no actual contract, the Texas Act was held not to apply to a maritime tort.

*Southern Pacific v. Jensen*, 244 U. S. 205, is referred to as establishing that the provisions of the New York Compensation Act could not be validly applicable to an employe engaged in maritime work and it is pointed out that the New York law contained a provision identical with G. C. 1465-98. Several considerations preclude either the decision or result in the *Jensen* case applying here. In the first place the scope of the *Jensen* decision is to be considered in the light of more recent decisions of this Court with respect to the application of workmen's compensation acts to matters which would otherwise concern admiralty jurisdiction. We have already considered several of these decisions but point to *Grant, etc. Ship Co. v. Rohde*, 257 U. S. 649, as an example. In the second place, Jensen, unlike Gilvary, was engaged in work of a maritime nature exclusively within the jurisdiction of Federal power. In other words, it would be as if Gilvary in the instant case had been engaged in interstate commerce, in which event, of course, the case would not be here as neither the Ohio statute nor the contract would apply. In the third place, while the New York Act did contain a provision similar to G. C. 1465-

98, there is nothing in the findings of fact in the *Jensen* case that either Jensen or his employer had expressly contracted with each other under favor of that or any other section. In fact, in so far as maritime work is concerned, the similar section of the New York Act contains no authority for a voluntary contract between employer and employe engaged in maritime work but the authorization given by the section is, of course, limited to engagements in interstate commerce, presumably by rail. This consideration disposes of the cases of *State ex rel. v. Duffy*, 113 O. S. 96, 148 N. E. 572, and 113 O. S. 579, 149 N. E. 570, cited by petitioner.

In the second report of *State ex rel. v. Duffy*, 113 O. S. 579, 149 N. E. 570, the Supreme Court of Ohio determined nothing more than that the employe there was engaged in maritime work and that the Ohio Compensation Act had no application—a conclusion undoubtedly correct, particularly in view of the fact that the Ohio Act contains with respect to maritime matters no such provision as G. C. Sec. 1465-98, dealing with the matters of *inter-* and *intrastate commerce*.

The cases of *Knickerbocker Ice Co. v. Stewart*, *supra*, and *Duart v. Simons*, 231 Mass. 313, 121 N. E. 10, are not to the contrary. Indeed the decisions of this Court in *Southern Pacific v. Jensen* and the *Knickerbocker Ice Company* cases have been otherwise interpreted by the Supreme Court of Oregon in *West v. Kozer*, 104 Ore. 94, 206 Pac. 542, *supra*, and we quote on page 543 (Reporter):

> "We do not understand the court as holding that an employer and an employee may not, as between themselves, contract to take out a form of accident insurance which shall be the measure of the liability of the employer in case of accident, and preclude the necessity of litigation in the federal courts, which is the case here presented. The method is a beneficent one,

> insuring to every employee a certain remedy and fair compensation instead of difficult litigation, a doubtful remedy and in many cases resulting in no compensation."

And again (p. 544):

> "It is not the policy of the law, international or otherwise, to pull parties into court by the hair when they have agreed between themselves upon a method of keeping out, and, in view of the decision last quoted, this ought to terminate the present controversy in favor of the petitioners."

Petitioner (p. 28) cites *Mountain Timber Co. v. Washingtpn*, 243 U. S. 219; *Hawkins v. Bleakley*, 243 U. S. 210 and *New York Central v. White*, 243 U. S. 188, as establishing that the state systems of compensation are valid, whether voluntary or compulsory and that, therefore, it is immaterial whether the "supposed contract is express or implied or whether the relationship arises out of action or non-action or is the result of a conclusive presumption." This proposition ignores several material considerations. One is that merely because the state has the right to enact either sort of compensation law it does not follow that the effects of the two are identical. The other is that the word "elective" as applied to a particular compensation act normally describes a system which, wholly unlike the Ohio law (G. C. 1465-98), leaves it optional with the employer to operate under the particular act and then presumes consent in absence of a dissent by the employe. In other words, at the risk of repetition, we point out (a) a lack of any compulsion under the Ohio law; (b) a lack of any provision in the Ohio law drawing within its terms an employer and employe without their respective conscious and written assents; and (c) the provision in the Ohio law for an affirmative voluntary act on the part of each party, is in turn subject to the approval of the state. It is to state the ob-

vious to say that there is a wide difference between the enforcement of a state law as law and the enforcement of a voluntary agreement permitted by a state law and limited to a subject-matter over which the state has jurisdiction. *Railroad v. Armburg, supra.* Even under the *Jensen* case read in the light of the subsequent decisions of this Court, for example, *Grant, etc. Ship Co. v. Rohde, supra,* and *Western Fuel Co. v. Garcia,* 257 U. S. 233, it is open to suggest by way of analogy that within the principle of "local concern," where, as here, the case involves intrastate commerce, a permissive agreement does not, although inclusive of a right (actual or potential) under a Federal Act, work any material prejudice to Federal law, *i.e.*, the Safety Appliance Act, particularly where such a contract in effect recognizes the Federal right by providing the employe who thus voluntarily contracts, with a substantial consideration for the surrender of such a right. In so far as the decisions of this Court upholding an express contract, where admiralty matters are involved, we have already referred to *Northern Coal Co. v. Strand,* 279 U. S. 142.

We now turn to—

### 3—The question of estoppel.

Here, we suggest that if the provisions of the Ohio Compensation Act here involved may be said to be invalid because as construed by the Supreme Court of the State they preclude rights accruing by reason of the enactment of the Federal Safety Appliance Act, the plaintiff nevertheless by his voluntary contract and consequent operation, so to speak, under the Act is estopped, under the circumstances, from asserting such invalidity. It seems quite clear that the section of the Ohio law (G. C. 1465-98) is permissive only and that its invalidity would not affect the

contract. *Shepard v. Barron*, 194 U. S. 553, 566. Otherwise stated, the fact that the plaintiff's and defendant's action here was as between themselves voluntary, would serve to insulate the contract from any defect in the permissive statute, the validity of which is immaterial, the parties having acted thereunder.

As a contract standing alone and disassociated from the statute, it is we submit entirely valid. It may not be said that such a contract is invalid from any standpoint of public policy of the state. On the contrary, it is pursuant to the public policy of the State of Ohio, as expressed in the provisions of its Constitution (Art. II, Sec. 35, elsewhere referred to herein), and which provisions must be considered valid at least for the purpose of expressing such a policy. Further, as hereinabove pointed out, no act of Congress prohibits such a contract.

Under these considerations the case is within the rule of *Booth Fisheries Co. v. Industrial Commission*, 271 U. S. 208.

Here, where the Wisconsin Compensation Act was elective, the employer, the Fisheries Company, elected to operate under the Act and later with respect to a claim made against it under that Act attempted to assert that the law was unconstitutional. After pointing out that the Act was elective and that a non-participation in the Act would leave the employer fully protected in so far as the constitutional objection which it was then asserting was concerned, the Court, through Chief Justice Taft, said (p. 211):

> "More than this, the employer having *elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint. Daniels v. Tearney*, 102 U. S. 415, *Grand Rapids & I. R. Co. v. Osborn*, 193 U. S. 17."

As was said by Mr. Justice Peckham in *Shepard v. Barron, supra* (p. 568):

> "Certainly when action of this nature has been induced at the request and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid. * * *."

This principle is the rule in Ohio. See *Tone v. Columbus*, 39 O. S. 281; *Stage v. Cleveland*, 94 O. S. 377, 114 N. E. 261; *State ex rel. v. Turner*, 93 O. S. 379, 113 N. E. 327. "A citizen may waive a constitutional right." *Byers v. Printing Co.*, 84 O. S. 408, 422, 95 N. E. 917. See also *State ex rel. v. Creamer*, 85 O. S. 349, 97 N. E. 602, *supra*.

> "The provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up." *Shepard v. Barron, supra*.

Like the employer in the *Booth Fisheries* case, *supra*, Gilvary expressly agreed with the company, with the approval of the Industrial Commission, that the respective rights and liabilities of himself and employer

> "shall be governed by the provisions of the Workmen's Compensation Law of Ohio in all cases in which such injury * * * is sustained while * * * engaged in *intra*-state commerce."

and also requested—

> "the Industrial Commission of Ohio to approve"

his election to operate under the Act. The Commission did so. More than that the company paid its premiums based upon his election (defendant's exhibit 2). He had

"operated" under such election for the eight months during which he was employed prior to the accident. During that time he was not only protected in respect of injury sustained in the course of his work caused by negligence but injuries from any other cause unless self-inflicted (G. C. 1465-68), and also from the effects of *an occupational disease* (G. C. 1465-68a, *et seq.*), and in addition thereto his dependents were likewise protected in the event of his death in the course of his employment from whatever cause (other than self-inflicted) and including death due to occupational disease.

Gilvary was an experienced railroad employe, having been so employed for twenty-three years prior to his accident. (R. 42.) He was familiar, in fact is presumed to be familiar with laws such as the Safety Appliance Act, enacted in 1893. His voluntary and studied election under the compensation act was not only a two-party agreement between himself and employer but at his request the State of Ohio, through its Commission, approved his election and thereby in effect became a party, *West vs. Kozer, supra*, and thus made available to him, in the event of injury or death, (1) the compensation fund of the state, or its equivalent security, and (2) the power of the state to compel and secure to him the remedies and benefits which the state law gave him upon his election. The awards made by the commission are preferred and put on a parity with taxes. (G. C. 1465-77.) The commission has the widest powers. It has jurisdiction to hear and determine all questions within its jurisdiction and its decision is final except for the right of *employe* to appeal. (G. C. 1465-90.) It may compel the attendance of witnesses and the Attorney General of the state is its counsel to enforce its orders in the courts.

A party may not procure action by a state commission under state statute and then assail such action on the theory that the statute under which it was taken is invalid. *United*

*Kuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 307. An election, as provided under state law, bars a litigant who availed himself of the power conferred from denying the validity of the law. *Electric Co. v. Dow*, 166 U. S. 489. See also *Eustis v. Bolles*, 150 U. S. 361; *St. Louis v. Prendergast Co.*, 260 U. S. 469.

We see no difference between the position of Gilvary and that of the parties occupying a similar status in the *Booth Fisheries* and *United Gas* cases, *supra*—each acted under or elected to accept the law. The fact that here the employe made the election rather than the employer is no ground for the non-application of the principle there established, *i.e.*, of waiver and estoppel. Under the decisions of this and the Ohio Supreme Court, *supra*, the invalidity of of the entire Workmen's Compensation Act could not affect this contract. The company could not avoid its obligations, which from the standpoint of the law of contract would be enforceable according to the standards of the Act. Even the State of Ohio having approved the contract and therefore a party to it would be estopped to dispute its validity or that of G. C. 1465-98 authorizing it. *State ex rel. v. Turner*, 93 O. S. 379, 113 N. E. 327.

The judgment below did not deprive Gilvary of his right to compensation, including a possible fifty per cent increase should the Commission find the injury proximately caused by a defective coupler. (Ohio Consti. Art. 11 Sec. 35 and G. C. 8950.) In this connection the record shows statement of counsel (R. 25) that the Company has at all times been ready to perform its part of the contract. The two year limitation G. C. 1475-72 does not apply. Even an oral claim against an employer who as here pays direct is sufficient. *Tyler Co. vs. Rebic*, 118 O. S. 522, 161 N. E. 790. Notice of an accident is required to be reported within a week. (G. C. 1465-99.)

**B—The defendant otherwise was entitled to a directed verdict in its favor because (1) the finding of the jury that there existed any defect in the coupler or couplers (the sole basis of the plaintiff's case) is not supported by the requisite degree of proof; and (2) the couplers, even if defective, constituted a condition as distinguished from the proximate cause of the accident, which if proximately due to acts (even if negligent) of plaintiff's co-employes are compensable only according to the agreement.**

**1. The finding of the jury is not supported by the requisite degree of proof.**

The verdict, it will be observed, rests *solely* upon the admitted fact that the cars did not couple. The plaintiff, although the couplers were immediately before him prior to the accident, does not undertake to say or claim that there was anything broken or defective about them. In fact he testifies that he could see nothing wrong with either coupler. We quote as follows:

> "Q. So that you stood within two feet and a half of that car, charged with the duty of ascertaining whether the thing was open and to the extent that you looked at it you couldn't see that anything was wrong or broken about it, could you? A. No, sir." (Referring to the Pee McKee car, Rec. 66.)

Again:

> "Q. Now you had looked at the Baltimore and Ohio coupler before you gave the swing-down signal, hadn't you—I mean the steady signal? A. Yes.
>
> Q. You were the man that was in charge of the coupling operation? A. Yes, sir.
>
> Q. And you were therefore the man who was in control so far as signals were concerned? A. Yes, sir.
>
> Q. And you could have stopped that cut at any time it came down there, couldn't you? A. Yes, sir." (Rec. 70.)

* * * * *

"Q. And how far was the Baltimore and Ohio car from the knuckle when those cars stopped? A. Two or three feet."

And again:

"Q. And what do you say to this jury in opening that thing, whether you could see anything broken or defective about that coupler? A. Could not.

Q. All right. And therefore did not, I suppose? I assume, is that right? A. I said, could not.

Q. All right, now you have that open and then what did you do? A. Looked all right, looked to be in line to me and I signalled the engineer to back up." (Rec. 73.)

And again:

"Q. Yes, but to the extent that that object as it came down toward you, slowly, with the coupler closed, to the extent that you observed it, you coudn't see anything wrong with the Baltimore and Ohio coupler, could you? A. No, sir." (Rec. 78.)

We concede that apart from questions of proximate cause, the failure of a coupler to operate constitutes a prima facie case of defect but this is *only a prima facie case* and we submit that upon this record, in view of the fact (1) that the coupling was attempted upon a curve and a grade; (2) the most rigid inspection immediately after the accident disclosed no defect; (3) the actual coupling of the cars after a necessary adjustment of the draw-bars had been made after the accident; (4) the running test which occured the next day; (5) the photographic exhibits; and (6) the uncontradicted evidence of three experienced railroad men that the failure of the cars to couple, in view of the curve, was no indication that the couplers were defective—it follows that the weight of such evidence on behalf of the defendant not only equalized but overcame the prima facie case made by the failure of the couplers to operate and that in the absence of any evidence by way of rebuttal going to

the weight of the defendant's case the verdict is not supported by the evidence. We submit that this is particularly so because from a standpoint of fact the decisions of the Federal courts recognize the fact that the failure of a safety appliance to work may, under certain circumstances, occur without the Safety Appliance Act having been violated. *Railroad v. Parker*, 242 U. S. 56; *Railway v. Jones*, 300 Fed. 525; *Railway v. Arrington*, 126 Va. 194, 101 S. E. 415, certiorari denied 255 U. S. 573.

Our claim in this regard becomes all the more substantial in view of the fact that where the issue involves proof of a violation of a Federal Act, the standard of such proof is *that required under Federal law*. In other words, if the rights and obligations of the plaintiff depend on the Federal Safety Appliance Act, the kind or amount of evidence required to establish in fact a violation of this act is not subject to control of the several states. *Railway Co. v. Coogan, Admx.*, 271 U. S. 472, Syl. 1; *Railroad v. Aeby*, 275 U. S. 426. These cases establish the following rule,—and we quote as follows from the opinion in the *Coogan* case, *supra*,—

> "The kind or amount of evidence necessary to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

and again:

> "* * * It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury *reasonably* may draw therefrom would be insufficient to support a different finding."

Under the Federal rule the scintilla rule not only does not apply but has been expressly condemned. *Small Co. v.*

*Lamborn*, 267 U. S. 248. The rule is otherwise stated that where—

> "* * * the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict if returned would have to be set aside, the court may and should direct a verdict for the other party." *Slocum v. Life Insurance Company*, 228 U. S. 364, 369.

See also *Railway v. Martin*, 283 U. S. 209.

Tested by the standard of this rule, we submit that the verdict is clearly not sustained by the evidence and the court should have directed a verdict for the defendant.

**2. The couplers, if defective, constituted a condition as distinguished from the proximate cause of the accident.**

Plaintiff's case is summed up by the following question put and answer given on cross examination (Rec. 76):

> "Q. So that the cause of your accident was, when you had your hand in there, the engineer disregarding the signal you had given him and disregarding his acceptance signal, you say moved that train back?
>
> A. Yes, sir.
>
> Q. And caught your arm?
>
> A. Yes, sir."

The Court will remember that the claim of the plaintiff was that there were two unsuccessful attempts at couplings; that he thereupon blocked the most southerly (the P. McK. & Y.) car and being unable to open a knuckle of the lever he "swung the engineer down" (which signal was accepted by the engineer) and that thereafter he (Gilvary) went in between the cars and that *thereafter* the train was moved back. If this story is true—and it was believed by the jury and was, therefore, the basis for the

verdict—the proximate cause of the accident was as a matter of law the negligence of the engineer, and the condition of the couplers, if defective, was under the authorities hereinafter referred to, a condition and not the cause of the accident. Obviously the negligence of the engineer—in view of (a) withdrawal from the petition of any claims in that regard and (b) the fact that for an accident thereby caused the Workmen's Compensation Act would under the contract apply—cannot be the basis of recovery in this action. The trial court, as requested by the defendant, instructed the jury (Rec. 184):

> "I instruct you that before the plaintiff is entitled to recover * * * he must not only establish * * * that one or both of these couplers was defective or insufficient but he must further establish that the proximate cause of his accident, as I shall define 'proximate cause', was a defective or insufficient condition in one or both of these couplers. Hence if you find that the proximate cause of this accident, as I shall define that term to you, was the movement of this train, whether by the engineer without a signal from the plaintiff or otherwise, your verdict will be in favor of the Railway Company, even if you find by the greater weight of the evidence that one or both of these couplers were defective or insufficient."

The following authorities establish the correctness of this charge:

*McCalmont v. Railroad*, 273 Fed. 231, affirmed 283 Fed. 736, certiorari denied 260 U. S. 751;
*Railway v. Wiles*, 240 U. S. 444;
*Lang v. Railroad*, 255 U. S. 455.

We quote from the last named case:

> "Failure of a railroad to equip a car with automatic couplers, as required by the Safety Appliance Act, will not render it liable to an employe for an injury of which the delinquency was not the proximate cause."

Obviously on the testimony of the plaintiff, on which this verdict rests, the proximate cause of his injury was the negligence of the engineer, for which there is no liability in this case. The failure of the couplers to operate was on plaintiff's testimony no more than a *condition*—but not the cause—of the accident and under these decisions may no more be considered a cause of Gilvary's injury than the fact that he was then and there employed by the Company.

**C—The court's charge to the jury.**

Our point here concerns the charge of the Court as it involved the closely contested issue with respect to whether or not the couplers, or either of them, were defective. As heretofore pointed out, the case of the plaintiff (if there was a case for the jury) rested solely on the failure of the couplers to work (and this under either theory *i.e.*, whether the accident occurred after the first failure to couple, as testified to by defendant's witnesses, or after the second attempt, as testified to by the plaintiff). In other words, plaintiff's case rests upon the inference arising from what we concede to be a prima facie case made in his behalf on the failure of the couplers to operate. As hereinbefore set forth, the plaintiff does not testify to any observed defect in the couplers and he is his only witness in this regard. The evidence on behalf of the defendant, both with respect to the condition of the couplers (including their operative condition) immediately after the accident, the photographs and the test made the next day, coupled with the testimony of experts with respect to the curve, tended to establish (1) that the couplers as such were in proper condition and (2) that any operative failure was due to (a) the curve in the track and (b) the failure of the plaintiff himself to adjust the draw-bars to accommodate the couplers to the curve. The trial court held that the

question was one for the jury. Any question for the jury could have only been made by reason of the prima facie effect given by failure to operate as against the affirmative evidence of the defendant, including the fact of the curve as excusing such failure to operate without adjustment of the draw-bars. The jury question was thus upon a very narrow issue and required, we submit, a careful and correct instruction to the jury as to the law. This the defendant did not get.

Defendant requested before argument certain instructions to the jury. Under Ohio practice, if either party requests an instruction before argument the giving thereof, if a correct statement of the law, is mandatory. (G. C. 11447 §5.) Obviously if the charge as given is later modified by any instruction in the general charge or otherwise it is impossible to say that the jury was properly advised of the law of the case.

Three things contributed to the verdict in this case. In the first place, the Court refused after having given part of the law (Defendant's Request No. 6) to complete the correct statement by giving Defendant's Request No. 7. In the second place, in its general charge to the jury (hereinafter quoted) it modified the instruction which it gave before argument. (Defendant's Request No. 6.) In the third place, it impliedly approved, by permitting over defendant's objection, plaintiff's counsel in his argument to the jury as to a court decision, a rule of law entirely inapplicable to the case on the facts and which rule of law foreclosed the defendant upon the defense which it was attempting to make, to-wit, that admitting the prima facie case in favor of the plaintiff arising by reason of the failure of the couplers to work, nevertheless the circumstances, to-wit, the presence of the curve and the failure of the plaintiff to adjust the draw-bars, excused in law such failure.

In support of this claim we quote the record.

The defendant requested, and the Court instructed the jury before argument as follows (No. 6):

"I say to you as a matter of law that the fact that these Baltimore & Ohio and P. McK. & Y. cars failed to couple does not necessarily establish that either or both of the couplers were defective, and you must consider all of the surrounding circumstances, including the curve or curves of the track, the grade thereof, the length of the cars and the fact that there is necessarily a permissible amount of side-play in the draw-bars. Hence, if you find that the failure of these two cars to couple was solely due to the curve, the grade of the track and the non-alignment of the draw-bars, due to a permissible side-play thereof, or that such failure was solely due to any, or any combination, of said causes, the plaintiff cannot recover here, and your verdict will be in favor of The Cuyahoga Valley Railway Company." (Rec. 184.)

To supplement Instruction No. 6 and to define the terms implied in Instruction No. 6, the defendant requested the Court to instruct the jury as follows:

"I instruct you that side-play in a coupler, according to a standard in general and accepted use on railroads, does not constitute a defect in the coupler, and unless you find by a greater weight of the evidence that there was in one or both of the couplers involved in this case greater side-play than was necessary to bring about, when properly operated and given a fair trial, the automatic coupling of the cars by impact, then I say to you, as a matter of law, that neither of these couplers can be found by you to be defective in that regard. Hence I say that if, by the greater weight of the evidence, you shall find that a failure of these two cars to couple was solely due to a curve of the track and the permissible side-play of the couplers, as I have just defined it to you, or either one of these conditions, your verdict will be in favor of the Cuyahoga Valley Railway Company." (Rec. 175.)

This the Court refused. (Rec. 185.)

These instructions, we submit, were warranted by the decision of this Court in *Atlantic City Railroad v. Parker*, 242 U. S. 56; *Railway v. Jones*, 300 Fed. 525, and *Railway v. Arrington*, 126 Va. 194, 101 S. E. 415 (certiorari denied 255 U. S. 573). The Court in its general charge gave the following instruction (Rec. 191):

> "If you find, under all the evidence * * * that plaintiff's said injuries were the proximate and direct result of a defective or an insufficient coupler; that is, one, although not defective, was nevertheless inadequate for the purpose or use intended, then your finding will be for plaintiff for such compensatory damages you may find under the evidence proximately resulted to him because thereof, and not otherwise.
>
> "A defective coupler is one that, either by reason of its incomplete or faulty construction or imperfect dimensions or weak condition, renders it inoperative on use to couple automatically by impact, while an insufficient coupler is one such as I have already described to you.
>
> "The law required of defendant that it have its railroad cars equipped with couplers coupling automatically by impact. It imposed upon the defendant the positive duty that it have such couplers upon its cars, including the ones here in question, and that they be free from defect and be sufficient for such purpose—that is, for automatic coupling by impact, regardless of the kind or make, the humane purpose being primarily the protection of the employes and obviating the necessity or requirement of an employe going or being between the railroad cars. The grade and curve of the track at the point of impact in question, I construe to be, and so have instructed you, *are factors to be considered by you as to the practical operation of a railroad, and particularly upon the question of whether a coupler that merely does or does not automatically couple by impact under any and all existing conditions is or is not a defective or insufficient coupler.*"

This general instruction to the jury is obviously contrary to instruction given before argument, to-wit, No. 6, quoted *supra*. In other words, in the court's general charge he authorized the jury to return a verdict for the plaintiff if his injuries were the direct result of a defective coupler or of a coupler which although not defective was nevertheless inadequate for the purpose intended. He thereupon defines a defective coupler as "one which by reason of its incomplete or faulty construction, or imperfect dimensions or weak condition renders it inoperative" and an insufficient coupler as "a coupler not defective *but inadequate.*" In effect he instructed the jury that the failure of the coupler to operate was conclusive evidence of its defective or inadequate or insufficient condition and obviously the last sentence of the quoted general instruction does not constitute a charge to the jury to the effect that under cerain circumstances, *i.e.*, grade, curve, side-play of the draw-bars, or non-alignment of the draw-bars, the failure to couple is excused.

In other words, under the general instruction just quoted the plaintiff would be entitled to a verdict on facts which would entitle the defendant to a verdict under Instruction No. 6 given before argument.

In emphasis of the error thus committed, counsel for petitioner were permitted, with the implied approval of the Court, to argue to the jury (Rec. 185-186) in the asserted language of a court decision that—

> "The test of the observance of this duty is the performance of the appliances. The failure of a coupler to work at any time sustains the charge that the Act has been violated."

This was permitted to be done over the objection and exception of the defendant's counsel. There was no instruction by the Court to disregard the argument made and the argument made under the facts and circumstances, particularly in view of the conceded fact that the coupler did not

operate, could have had no other effect in view of the inaction of the trial judge and in view of his charge as given, *supra*, than to instruct the jury that all that was necessary to a recovery by the plaintiff was the failure of the coupler to work, a fact which was conceded. See opening statement of counsel. (Rec. 23.) It is impossible to say, under these circumstances, the jury received the issue (if one there was on the evidence) under the correct and accurate instructions which the closeness of the issue required.

Wholly aside from the error referred to, the argument of counsel was prejudicial under Ohio law. *Industrial Commission v. Gillard*, 41 O. A. 297, 179 N. E. 514, *Insurance Company v. Cheaver*, 36 O. S. 201. The practice has been condemned in *Ray v. C. & O.*, 57 W. Va. 333, 50 S. E. 413. The Federal rule does not permit such argument. *Roberts vs. Cooper*, 20 Howard 467; *Press Pub. Co. vs. McDonald*, 63 Fed. 238 (2 C. C. A.); *Brown vs. United States*, 298 Fed. 428 (2 C. C. A.).

## CONCLUSION.

We, therefore, submit—

1. The judgment of the Ohio courts sustaining the contract between Gilvary and his employer as a bar to plaintiff's action is correct and should be affirmed;

2. The finding of the jury in the trial court, either that (a) there was any defect in the couplers or (b) that the condition of the couplers, if defective, was the proximate cause of plaintiff's accident is not supported by a requisite degree of proof; and

3. In any event, on account of error intervening upon trial of the action, the judgment of the trial court may not be sustained.

Respectfully submitted,

W. T. Kinder,
H. Chapman Rose,
*Attorneys for Respondent.*

## APPENDIX A.

### Ohio Constitutional and Statutory provisions with reference to Workmen's Compensation.

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Sections 34 and 35 of Article II of the Constitution of Ohio, are as follows:

Section 34: "Welfare of employes.

"Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employes; and no other provision of the constitution shall impair or limit this power."

Section 35: "Workmen's Compensation.

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, * * *. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; * * *. When it is found, upon hearing, that an injury, disease or death resulted because of such failure

by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board. * * *"

The Workmen's Compensation Act of Ohio is found in General Code, Sections 1465-37 to 1465-110. Creation of the Industrial Commission and definition of its powers in certain respects is found in General Code, Secs. 871-1 to 871-53a.

Classification of occupations for industries, Sec. 1465-53.

Rates of Premiums, Sec. 1465-53a.

Employers subject to the law, Sec. 1465-60.

Definition of Terms, Sec. 1465-61.

Who entitled to compensation, Sec. 1465-68.

Occupational Disease, Sec. 1465-68a, *et seq.*

Non-compliance and misdemeanor, Sec. 1465-69a.

Employers complying with act not liable to respond in damages at common law or by statute, Sec. 1465-70.

Power of state in connection with enforcement of the remedies and benefits given by the act, Sec. 1465-74-75.

Preference of Judgments secured by Commission or the State under the act, Sec. 1465-77.

Power of Commission to hear and determine questions; appeal, Sec. 1465-90.

Commission not bound by technical rules of evidence, Sec. 1465-91.

No agreement by employe to waive rights to compensation under the act is valid and no employe may be required to contribute to any part of the premium, Sec. 1465-94.

Application of act to employers and employes engaged in intrastate and interstate and foreign commerce, Sec. 1465-98.

Attorney General or Prosecuting Attorney are the law officers of the Commission, Sec. 1465-100.

Contracts indemnifying employer for loss and liability under the act void, Sec. 1465-101.

The Industrial Commission created, Sec. 871-1.

Supersedeas Board of Awards, Sec. 871-12.

Employer required to protect life and safety of employes, Sec. 871-15-16.

All places of employment under Commission's supervision, Sec. 871-21.

Powers of the Commission reference enforcement of law relative to life and safety; authority with respect to hours of labor, safety devices, Sec. 871-22.

All action and proceedings under compensation law and to which Industrial Commission and State are parties are preferred over other civil actions, Sec. 871-42.

## APPENDIX B.

The following is a brief summary of certain decisions of the Supreme Court of the United States permitting a state to apply its law to transactions involving interstate commerce, in spite of the regulation by Congress, in varying degrees, of the subject matter of the transactions:

In *Sherlock v. Alling*, 93 U. S. 99, it was held that, although Congress had passed statutes governing navigation of the Ohio River and providing for liability of the masters and owners of vessels in certain circumstances, Indiana might apply its wrongful death statute to claims arising from a collision, negligently caused, occurring in interstate navigation.

In *Smith v. Alabama*, 124 U. S. 465, it was held, over arguments drawn from the Commerce Clause of the Federal Constitution and the Interstate Commerce Act of 1887, that Alabama might require engineers operating only interstate trains to procure an engineer's license from an Alabama board of inspection. A somewhat similar statute requiring all engineers, firemen, conductors, etc., including those engaged in interstate commerce, to be tested for color blindness and disqualifying those found unfit was upheld in *Nashville etc. Railway v. Alabama*, 128 U. S. 96.

In *Western Union Telegraph Co. v. James*, 162 U. S. 650, it was held that the Act of 1866, regulating interstate telegraph companies and messages to some extent, did not prevent Georgia from imposing a penalty, recoverable in civil action, for failure to use due diligence in the delivery of an interstate message to the Georgia addressee.

In *Missouri, Kansas & Texas Railway v. Haber*, 169 U. S. 613, it was held that in spite of the enactment by Congress of laws penalizing the transportation in interstate commerce of cattle known to be diseased, a state might

impose civil liability for damages resulting from such transportation; and in *Reid v. Colorado*, 187 U. S. 137, it was held that a state might make importation of such diseased cattle in interstate commerce a misdemeanor, unless they had been inspected by designated state officials, or, as in *Asbell v. Kansas*, 209 U. S. 251, by the Federal authorities.

In *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, it was held, over arguments drawn from the regulation of interstate rates and carriage by the Interstate Commerce Act, that Pennsylvania might apply to a contract for interstate carriage its common law rule forbidding a carrier to limit its liability for negligence.

In *Crossman v. Lurman*, 192 U. S. 189, it was held that an Act of Congress prohibiting importation into the United States of adulterated foods did not prohibit New York from enforcing its own prohibition against the importation of adulterated coffee beans from Brazil.

In *Missouri Pacific Ry. v. Larabee Mills*, 211 U. S. 612, it was held that the enactment of the Interstate Commerce Act did not prevent a state from forbidding discrimination between shippers in switching cars for interstate shipments, in the absence of exercise by the Interstate Commerce Commission of the power vested in it by the Act to compel equal switching facilities.

In *Savage v. Jones*, 225 U. S. 501, it was held that the Federal Food and Drugs Act, prohibiting adulteration and misbranding of foods and drugs transported in interstate commerce, did not prevent Indiana from applying to interstate sales of medicine for stock its own statute forbidding sales within the state unless the ingredients were disclosed by the label.

In *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, it was held that the Hepburn Act prohibiting passes in certain cases did not prevent the law of the state from giving

an action for wrongful death to the representatives of a decedent who was illegally using a pass.

In *Atlantic Coast Line v. Georgia;* 234 U. S. 280, and in *Vandalia Railroad v. Public Service Commission,* 242 U. S. 255, it was held that the Federal Safety Appliance Act and subsequent similar enactments dealing in part with locomotive equipment did not prevent a state from requiring that all locomotives operating within the state, including those engaged in interstate commerce, be equipped with electric headlights of given power.

In *Missouri, Kansas & Texas Ry. Co. v. Harris,* 234 U. S. 412, it was held that, though the Carmack Amendment to the Hepburn Act, in stating the measure of liability for loss of interstate shipments, did not allow recovery of attorney's fees as costs, it was competent for Texas by statute to allow such fees in its own courts to successful complainants in suits for losses of interstate shipments up to $200 in value.

# SUPREME COURT OF THE UNITED STATES.

No. 575.—October Term, 1933.

John L. Gilvary, Petitioner, vs. Cuyahoga Valley Railway Company. } On Writ of Certiorari to the Supreme Court of the State of Ohio.

[April 2, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

This is an action brought by petitioner to recover for personal injuries sustained by him in April, 1929, while employed by respondent as a switchman at Cleveland, Ohio. Respondent is a common carrier by railroad wholly within that State engaged in intrastate and interstate commerce. And the Safety Appliance Acts make it unlawful for it to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by impact.[1] In accordance with the Ohio workmen's compensation act,[2] petitioner and respondent had theretofore notified the industrial commission that they elected, in case of any injury sustained by petitioner while engaged in intrastate commerce, to have their respective rights and liabilities governed by the provisions of that Act. The commission had approved the

[1] § 2, Act of March 2, 1893, 27 Stat. 531, 45 U. S. C., § 2. § 1, Act of March 2, 1903, 32 Stat. 943, 45 U. S. C., § 8.

[2] "The provisions of this act shall apply to employers and their employes engaged in intrastate and also in interstate and foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, and then only when such employer and any of his workmen working only in this state, with the approval of the state liability board of awards, and so far as not forbidden by any act of congress, voluntarily accept the provisions of this act by filing written acceptances, which, when filed with and approved by the board, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms, during the period or periods for which the premiums herein provided have been paid. Payment of premium shall be on the basis of the payroll of the workmen who accept as aforesaid." G. C., § 1465-98.

agreement, respondent paid the premiums necessary to keep it in force and in all respects complied with the law. Petitioner was injured while he and respondent were engaged in intrastate commerce.

The complaint alleges that his injuries were caused by respondent's failure to comply with the Safety Appliance Acts in that cars which he, with other members of his crew, was attempting to couple were not equipped with couplers that would couple automatically by impact, thereby making it necessary for him to go between the ends of the cars where he was caught and injured. In addition to a denial of the violation of the statutes, respondent's answer sets up the election to be bound by the state compensation act. The court held that the agreement was not sufficient to constitute a defense and struck out that part of the answer. The trial resulted in a verdict and judgment for petitioner. The court of appeals reversed and gave final judgment in favor of the respondent "for the reason that the acceptance and notice of election by the employee contract approved by the Industrial Commission of Ohio is a complete bar to a right of recovery in this action". In the state supreme court, the judges being equally divided in opinion, the judgment of the court of appeals was affirmed.

As the petitioner when injured was not engaged in interstate commerce, the Federal Employers Liability Act does not apply, and the question is whether the agreement of the parties, in pursuance of the Ohio statute, is repugnant to the Federal Safety Appliance Acts.

Unless excluded by congressional enactment under the commerce clause, state law governs the respective liabilities and rights of railroad carriers and their employees growing out of injuries suffered by the latter whether in interstate or intrastate commerce. *Second Employers' Liability Cases*, 223 U. S. 1, 51. The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 290. Cf. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605. The purpose exclusively to regulate need not be specifically declared. *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147. But, ordinarily such intention will not be implied unless, when fairly in-

terpreted, the federal measure is plainly inconsistent with state regulation of the same matter. *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 510.

The Safety Appliance Acts govern common carriers by railroad engaged in interstate commerce. The Act of 1893 applied only to vehicles used by them in moving interstate traffic. 45 U. S. C., § 2. Its requirements were by the Act of 1903 extended to all their vehicles. *Id.*, § 8. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 26. *Moore* v. *Chesapeake & Ohio Ry. Co.*, — U. S. —, —. So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state regulation whether consistent, complementary, additional or otherwise. *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet. 539, 617. *Southern Ry. Co.* v. *R. R. Comm., Indiana*, 236 U. S. 439, 446. *Internat. Shoe Co.* v. *Pinkus*, 278 U. S. 261, 265. The imposition of penalties (*id.*, § 6) and abrogation of assumption of risk (*id.*, § 7) are measures for enforcement.

A violation of the Acts is a breach of duty owed to an employee, whether he is at the time engaged in interstate or in intrastate commerce. And, by abolishing assumption of risk the Acts impliedly recognize the right to recover for injuries resulting therefrom. But the absence of a declaration similar to that in the Federal Employers' Liability Act, which denounces contracts and other arrangements made for the purpose of exempting carriers from liability created by that Act (45 U. S. C., § 55), strongly suggests a lack of legislative purpose to create any cause of action therefor. Moreover, if there had been such purpose, Congress probably would have included provisions in respect of venue, jurisdiction of courts, limitations, measure of damages and beneficiaries in case of death.

Petitioner cites language in *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these Acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach "sprang from the principle of the common law" and was left to be enforced accordingly, or "in

case of death "according to the applicable statute". *Moore* v. *Chesapeake & Ohio Ry. Co.*, *supra*, —. *Minn. & St. Paul Ry.* v. *Popplar*, 237 U. S. 369, 372. These Acts do not create, prescribe the measure or govern the enforcement of, the liability arising from the breach. They do not extend to the field occupied by the state compensation Act. There is nothing in the agreement repugnant to them.

*Affirmed.*

Mr. Justice STONE and Mr. Justice CARDOZO concur in the result.

A true copy.

Test:

*Clerk, Supreme Court, U. S.*